Supreme Court, U.S.
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CASE NO.

In The
Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner.

v.

MOTOROLA, INC., a Delaware corporation and ADECCO EMPLOYMENT SERVICES, INC., a Delaware corporation.

Respondents.

On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

There is a split in the circuits (and within the Eleventh Circuit) concerning what evidence constitutes "direct evidence" for purposes of proving discrimination under Title VII of the Civil Rights Act of 1964, and what the proper definition, use, and effect of "direct evidence" is at the summary judgment stage of an employment discrimination case (*e.g.*, whether such evidence requires denial of summary judgment). Should that split be resolved, and did the District Court err by not finding that the following evidence constituted direct evidence of retaliation and/or constructive discharge: Bussell's supervisor (Karge) told her she would not be given a permanent position with increased pay and benefits because she "complained too much" about sexual harassment; Karge made a notation in Bussell's termination documents that she "[r]esigned due to continuing harassment"; a different management official testified (Bussell "was forced out due to continuing harassment"); and Motorola admitted to the EEOC that the harassment Bussell endured violated its anti-harassment policy and issued a separate finding that it did as well?

II.

Do sexual assaults (ripping down pants and touching the bare bottom, the breasts, and rubbing a penis 10-15 times against a woman) *per se* constitute sexual harassment, when the Respondents

management officials entered findings and testified that such touchings constitute sexual harassment (and did so in this case), or should they be viewed individually, and if the harassing conduct bothered men who witnessed it, did the District Court correctly conclude that summary judgment was appropriate on the ground that the harassment was not based on sex, because it bothered both sexes; should the split in the circuits on the following issues be resolved: whether touchings constitute sexual harassment *per se*, whether the totality of the circumstances should be viewed to determine whether the work environment was sexually harassing, and whether conduct alleged to be sexual harassment is not based on sex if males happen to witness the conduct and/or overhear remarks but are not bothered by such conduct or remarks?

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II. There is a split in the Circuits regarding the proof necessary to establish a claim for sexual harassment and the Court should resolve the important, but unanswered question concerning whether sexual assaults *per se* establish a claim of sexual harassment and whether a company's own admissions that sexual harassment occurred requires that summary judgment be denied in such a case. 21

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals affirming the Southern District Court of Florida's Order Granting Defendants' Motions for Summary Judgment is unpublished. It is included in the appendix at App. 1a. The district court's Order Granting Defendants' Motions for Summary Judgment is unpublished. It is included in the appendix at App. 11a. The Eleventh Circuit's denial of rehearing is also unpublished, and included in the appendix at 33a.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on July 13, 2005. App. 1a. Rehearing was denied on September 2, 2005. App. 33a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 (as amended)

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; ...

42 U.S.C. § 2000e-2(a)(1).

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> > (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
> >
> > (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-2(g)(2)(B).

STATEMENT OF THE CASE

On January 3, 2002, Meghan Bussell, ("Bussell"), a nineteen-year-old female, filed a Complaint in the United States District Court for the Southern District of Florida, bringing three causes of action (sexual harassment, retaliation, and termination/constructive discharge), pursuant to 42 U.S.C.

§ 2000e *et seq.* (Title VII of the Civil Rights Acts of 1964, as amended) and *Florida Statutes* § 760.01 *et seq.* (the Florida Civil Rights Act of 1992). (R1-1-1).

Following the close of discovery, the Defendants moved for summary judgment as to all claims in May, 2003. (R2-68, 72, 75). Bussell timely responded to the motion (R2-92-116) and the Defendants replied. (R3-120, 122). On August 22, 2003, the Court heard oral argument on the Defendants' Motions. (R4-173). On March 29, 2004, the district court entered an Order Granting Defendants' Motions for Summary Judgment as to all claims, holding that she could not establish that the sexual harassment was severe and pervasive to constitute actionable sexual harassment, could not establish a retaliation claim or constructive discharge claim. (R3-153). Bussell timely appealed the order granting summary judgment, but a three-judge panel affirmed the decision on July 13, 2005.

Bussell was employed by Adecco and assigned to Motorola's Plantation, Florida facility. Motorola and Adecco co-employed Bussell. During all material times, Bussell's Adecco immediate supervisor was Tom Karge and her Motorola immediate supervisor was Laila Pennington. Karge's supervisor was Kathy Brodeur, and Pennington's supervisor was Ana Martinez (Service Center Manager). Motorola's Human Resources Administrator, who became involved in this case toward the end of it, was Marcy Covington.

Both the Adecco and Motorola sexual harassment policies applied to Bussell. (R2-114-99-101). If an Adecco employee complained to a Motorola supervisor about being sexually harassed by a Motorola employee, the Motorola supervisor was supposed to report such a complaint immediately to Motorola Human Resources (HR). (R2-114-40, 45, 46-47, 52). Adecco had no on-site HR person or

department, and therefore if a supervisor could not handle a certain situation or had questions, the supervisor was to contact Adecco's corporate HR in New York. (R2-99-13).

Adecco required (and trained) Tom Karge to immediately investigate any complaint of sexual harassment. (R2-99-22-23). Karge was then required to report the allegation to Motorola's HR. (R2-99-50). The Motorola HR person and the Adecco supervisor were then supposed to coordinate an investigation, because the Motorola HR person would not be allowed to talk to an Adecco employee (and vice-versa) without an Adecco supervisor present. (R2-99-68); (R2-97-20-21, 36, 82-84). Despite this requirement, Motorola and Adecco did not conduct any such joint collaborative investigation into Bussell's claims. (R2-97-194-95, 198).

Bussell began working for the Defendants in May-June, 2000; Bussell was assigned to the Motorola's IDEN factory, and she worked on the Defendants' assembly line putting together cellular telephones, tuning them, and testing the buttons. (R2-109-25, 30-31). At the time Bussell started work, she was 19 years old. (R2-109-7). In July or August, 2000, Bussell was moved upstairs to Motorola's Inpact Center to work the first shift assembling police radios. (R2-109-35, 45). The primary sexual harasser was Bob Render; Jason Wells was involved in one incident.

Bussell began to be exposed to sexually-charged comments by Bob Render as soon as she came to the Inpact Center in August, 2000. (R2-109-54-55). Render constantly complimented Bussell for the way she looked, and these comments increased to the point where Render made them to Bussell every half-hour to every hour, and Render also talked about strip clubs. (R2-109-49, 55, 310-11). These comments made Bussell uncomfortable to the point where she complained

to Pennington, her Motorola supervisor, but the comments continued. (R2-109-49, 55).

Render spoke loudly, and constantly demeaned women, talking about the sex that he had the night before, about how he cheated on his wife, the strip clubs that he would go to, the shape of the women's bodies, and how many girlfriends that he had on the "side". (R2-109-50-53). Bussell described the comments as follows: "[Render] would basically say that he told his significant other that he was going to go fishing and that instead he went to the strip clubs and about how big the titties were on the stripper last night and he really gets off on that kind of stuff." (R2-109-53). Bussell testified that she thought that the comments constituted sexual harassment, particularly once they became almost continuous, and that even before that she felt that the comments were clearly inappropriate. (R2-110-310-11; R2-109-61). Render also uttered "come-ons" to Bussell at the workplace. (R2-10[illegible]-62-63).

When Render first touched Bussell (in October, 2000), Bussell "was bending down to one of the shelves to get the [Nextel] phones, which we called radios off the shelf to take them back to my desk to assemble them." (R2-109-63-64). Bussell described the first time that Render touched her as follows:

> I was bending over picking up the radios when I felt someone pulling the back of my pants down and the top of my shirt up, and like pulling—I mean, like, not just pulling a little bit, like grabbing down and yanking my shirt up . . . .
>
> * * *
>
> A: When he pulled my pants down, he said [something to me].

Q: Nothing else?

A: No.

Q: Did he make any comment about your body, your buttocks or –

A: He didn't need to, he was touching it. . . . [H]e had to touch my body to get my clothes. My clothes weren't just like loose off of me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my back.

* * *

Q: Okay. . . . You mean that he pulled down your pants and underwear?

A: Yes.

Q: Was it actually visible? I mean did you feel that?

A: He pulled my pants down. I mean his fingers were in the back of my pants and he pulled them down. My tattoo goes really far, pretty far down; and, yes, my pants were pulled down, so there was part of –

Q: Your buttocks were showing?

A: Yes.

Q: Was he also grabbing your shirt at the same time?

A: Yes.

(R2-109-77-78, 109-10; R2-110-350-51).

This sexual assault was also physically violent, as Bussell testified that when Render ripped her pants down he was touching her bare bottom, as follows:

> A: When he pulled my pants down, he said [something to me].
>
> Q: Nothing else?
>
> A: No.
>
> Q: Did he make any comment about your body, your buttocks or –
>
> A: He didn't need to, he was touching it. . . . [H]e had to touch my body to get my clothes. My clothes weren't just like loose off of me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my back.

(R2-109-109-10).

After Render pulled Bussell's pants down, and after a sexual harassment meeting was held, Render continued to sexually touch Bussell against her will. (R2-109-81-82). Render "began on a constant basis" to walk behind Bussell and rub his crotch up against Bussell's body. (R2-109-81). Bussell further described this sexually harassing touching as follows:

> But I would be sitting down and he would walk by and I could feel his pants and

the contents rubbing up against my shoulder. I would turn around and he would wink at me funny or smile at me funny, and I would get grossed out. . . .

Q: [D]id he literally turn his body sideways to place his genitals against you?

A: Yeah, if you want, I'll show you what he did.

Q: No, that's okay. He would literally turn himself sideways to rub his genitals across your shoulders?

A: Yes. . . .

Q: On any of those ten to 15 occasions where he rubbed his genitals up against you, did you say anything to him?

A: I would usually move up and go, uhhh, like make gross noises, stop or say something along the effects of that's really bothering me, but, I mean those are the only things I ever said. . . .

Q: Well, I just asked you if you said anything.

A: I'd be like oh, don't do that. That's stop it. . . .

Q: Okay. But did you go to anyone, any supervisor and say to anyone, hey, he just rubbed his genitals up against me?

A: Yeah, I was complaining to Tom and

> to Laila numerous times in a month where I mean towards the end it was more frequent because of HR's investigation. I was complaining about that, like seeing how long [it] was going to take for that to happen but . . . any time an incident would happen, I would go to Tom.
>
> Q: So, any time that Bob rubbed his genitals against your back, you would tell Tom?
>
> A: I would—yeah . . . .

(R2-110-305-06-08). Render would also stand behind Bussell and look down Bussell's shirt at her breasts. (R2-110-305). Render also sexually harassed Bussell with his verbal comments, as *he would tell her on a daily basis* that: her hair was getting really long, and that it was growing so fast because she was sexually active; why would you want to be with a boy when you could be with a man; he made sexual comments about her lips, like "wow, those are some pretty thick lips"; he called Bussell "dirty names"; he complimented Bussell on her breasts, and how every part of her body was exactly how he liked it. (R2-110-311; R2-109-165). Render would make comments about the size of Bussell's buttocks. (R2-116-94-95). Render would stare at Bussell's breasts and at her buttocks, and that this staring made Bussell scared to come to work and uncomfortable. (R2-116-107). Render was "talking dirty" to Bussell from the sexual harassment meeting until January. (R2-109-164). Jason Wells, another co-worker, came up behind Bussell, and touched her breasts with his hands. (R2-110-285-86).

The whole department, with the exception of the technicians and a female named Christina, thought that Render

was crude and vulgar. (R2-110-227-28). A co-worker named Christina flirted with Render, and they would talk about their sexual dalliances, and about strip clubs, and many co-workers in the department constantly stated that the comments were gross and they should stop. (R2-110-234-35). Bussell was literally forced to listen to Render "talk about big boobies all day and the shape of [ ]thing[s] on [Bussell's] body" all day long, on a daily basis. (R2-110-272-73). The severity and pervasity of the sexual harassment left Bussell traumatized, as she would not be able to sleep, and she would cry all night long. (R2-109-123, 120, 71, 94, 116, 160; R2-110-214, 244, 244-45, 270-71, 297, 301).

It is not in dispute that Bussell properly complained about the sexual harassment. Karge stated as follows:

> Q: How many times did Meghan complain to you about being sexually harassed.
>
> A: It would have been quite a few times, even after the investigation she felt and she probably still feels that she was sexually harassed. I'm sure I heard it a few times and we discussed it at that point.

(R2-112-127-28). Karge conceded that Bussell told him that she thought Render's sexually harassing comments were directed at her. (R2-112-130).

Although Bussell testified that she complained to Pennington constantly (as set forth above), Pennington testified that Bussell only complained to her on two occasions. (R2-116-58-59). Pennington performed absolutely no investigation

of Bussell's complaints, and she denied that she knew that there was any harassment occurring. (R2-116-48, 49, 60).

Covington conceded that the offensive comments that Bussell's co-workers told her Render was uttering created a hostile work environment, as follows:

> Q: Do you think it [Render's comments] creates a hostile work environment. [objections omitted]
>
> A: Yes. . . .
>
> Q: Yes. And did you find that there was, indeed, a hostile work environment where Meghan worked [objections omitted]
>
> A: Yes.

(R2-95-118-19).

On January 24, 2001, Motorola HR drafted an Incident Report which contained the following findings as to Render:

> Upon investigation that was conducted regarding allegations in the INPACT CENTER, it was verified that on numerous occasions you used inappropriate, foul and abusive language intimidating others in the conversations you were holding.
>
> In your meeting with Human Resources dated 1/19/01, you admitted that you made inappropriate comments. This constitutes a

> Class II infraction, contributing to a hostile/intimidating work environment and is in violation of Motorola Policy.

(R2-93-Ex.20).

Motorola's Statement to the EEOC stated that "Render was given an incident warning and put on probation for a one year period with the understanding that any further violations of the sexual harassment policy would result in his immediate termination." (R2-116-180-81). Martha Jaramillo, a high-level management of official of Motorola, who was the ultimate decision-maker concerning the discipline and resolution arising out of Bussell's complaints, testified that Render "created a hostile work environment discussing strip clubs and making comments and unwanted words." (R2-97-100).

In Karge's findings concerning the sexual harassment allegations, Karge found, on January 29, 2001, as follows: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept which was causing her to get ill. . . ." (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them. (R2-112-173-74).

Direct evidence of retaliation exists, because Karge told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining . . . ." (R2-110-268, 168).

Motorola admitted on page 48 in its Brief that Bussell was docked pay. Bussell lost income because of illness brought on by the sexual harassment, and because of the illness she was sent home without pay. (R2-109-159-62) (indicating she was sent home without pay even in January, 2001, after her complaints became known to Motorola HR, that she was sent home without pay on January 19 and 31, 2001). Bussell missed out on being made a permanent Motorola employee because of her complaints, and the greater pay and health care benefits associated with that permanent employment. (R2-159, 168, 169; R2-110-265). Bussell was given more than 3-5 times the work as similarly situated co-workers were given, shortly after her sexual harassment complaints. (R2-109-189-90, 193-94; R2-110-220, 260-64).

Karge told Bussell that he would "write a letter that says it was a forceful quit . . . [t]hat [Bussell] was forced to leave my job because of unhealthy circumstances, because they couldn't protect her from sexual harassment, [and] because they couldn't protect [Bussell] from retaliation . . . ." (R2-109-127). Kathy Brodeur did not allow Karge to give such a letter to Bussell. (R2-110-212-13). Brodeur (one of Adecco's managers) testified that Bussell did not quit. (R2-99-92). Brodeur believes that Bussell was essentially forced out of her employment "due to continuing harassment." (R2-99-168).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT, BUT UNANSWERED QUESTION CONCERNING THE DEFINITION, USE AND EFFECT OF "DIRECT EVIDENCE" IN AN EMPLOYMENT CASE AND THERE IS A SPLIT IN THE CIRCUIT COURTS OF APPEALS

REGARDING THIS ISSUE.

In order to establish an employment discrimination case, a plaintiff may use one or more of three methods: 1) presenting direct evidence of discriminatory intent; 2) meeting the burden-shifting test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); or 3) through statistical proof of a pattern and practice of discrimination. *Standard v. A.B.E.L. Serv., Inc.*, 161 F.3d 1318, 1330 (11th Cir.1998).

Whether evidence is direct or circumstantial evidence is a critical distinction in an employment discrimination case because the *McDonnell Douglas* framework is inapplicable where there is adequate direct evidence of discriminatory intent. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (O'Connor, J., concurring). Also, under the *Price Waterhouse* framework, a proffer of direct evidence shifts the burden of proof to the defendant-employer, who must then prove, notwithstanding the direct evidence, that it would have terminated the plaintiff anyway. *Ferrill v. The Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 962 (11th Cir. 1997). Finally, this burden shift to the defendant-employer is important because the proffer of direct evidence, viewed in the light most favorable to the non-moving party, necessarily creates a genuine issue of material fact that precludes summary judgment. *Seay v. Tenn. Valley Authority*, 339 F.3d 454, 463 (6th Cir. 2003) (holding that "[t]o avoid a grant of summary judgment on a Title VII claim, a plaintiff must either provide direct evidence of discrimination or establish a prima facie case" under *McDonnell Douglas*).

In the instant case, the comments, if believed, constitute direct evidence of discrimination, which in turn requires the

denial of summary judgment, because Bussell's Adecco supervisor (Karge) told her that she was not going to get a permanent Motorola position—increased pay and benefits—because she "complained too much" (direct evidence of retaliation), Kathy Brodeur's statement that Bussell "was forced out due to continuing harassment" (direct evidence of constructive discharge), Karge's written journal stating that Bussell "resigned due to continuing harassment" (direct evidence of constructive discharge) and both Respondents' findings that she was subjected to sexual harassment constitute direct evidence, and require the denial of summary judgment, concerning Bussell's sexual harassment , retaliation, and constructive discharge claims. *Id.* However, the lower courts did not even discuss the comments. There is clearly a split in the circuits concerning *Seay*, and the law in the Eleventh Circuit applied by the lower courts in this case.

What evidence constitutes direct evidence as opposed to circumstantial evidence is not easy to determine. *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 429 (1st Cir. 2000) (admitting that "[i]t is often quite difficult to draw the line between what is 'direct evidence' and what is 'circumstantial evidence.'"). The standard for what constitutes direct evidence is in conflict in the circuits.

The district courts have cried out for guidance in this area, *see, e.g.*, *Dilla v. West*, 4 F. Supp. 2d 1130, 1137-38 (M.D. Ala. 1998) and *Hearn v. GE*, 927 F. Supp. 1486, 1497-98 (M.D. Ala. 1996), and the *Dilla* case observed that:

> the determination of whether the plaintiffs have established age discrimination by direct evidence is somewhat complicated by the fact that the definition of what constitutes direct evidence of discrimination is subject

> to frequent shifts, even among different panels of the Eleventh Circuit.

Dilla, 4 F. Supp. 2d at 1137. The *Dilla* court stated that the Eleventh Circuit's different definitions of direct evidence were full of "murkiness." *Id.* at 1138 n.9.

The *Dilla* court noted that there seemed to be two different definitions of direct evidence in the Eleventh Circuit. For the first definition, the court cited to the case *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990), which applied a relatively broad definition of direct evidence, explaining that "direct evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee."

For the second definition, the court noted that in *Clark v. Coats and Clark, Inc.*, 990 F.2d 1217, 1223 (11th Cir. 1993), the panel stated that direct evidence of employment discrimination is evidence that "is sufficient to prove discrimination without inference or presumption."

Judge Thompson in *Dilla* was greatly troubled by these different and contradictory definitions for direct evidence, and asked several rhetorical questions in his opinion, as follows:

> [I]t is unclear what the Eleventh Circuit meant by its narrower definition that direct evidence is "evidence sufficient to prove discrimination without inference or presumption." *Clark*, 990 F.2d at 1223. Does the definition mean that the evidence is sufficient if it reflects, without inference or presumption, a mere discriminatory bias

> toward the group to which the employee belongs, in other words, that the evidence need only reflect a general discriminatory bias? Or does the direct evidence definition require more, that is, that the evidence must reflect, without inference or presumption, a specific discriminatory intent to commit the challenged conduct?

Dilla, 4 F. Supp. 2d at 1138. The court in *Dilla* urged that drawing the distinction between direct and circumstantial evidence in a discrimination case is needless and implausible. *Id.* n.9.

Six years ago, the Eleventh Circuit issued an opinion that was a veritable treatise with respect to the confusion surrounding direct evidence in the Eleventh Circuit. *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999). Unfortunately, however, that opinion was a stand-alone opinion by Judge Tjoflat, as the two other panel members (Judges Cox and Hull) refused to join in the opinion. Consequently, the *Wright* case has not been relied upon by many district courts or subsequent panel opinions. The *Wright* case held that there have generally been two different definitions used by the Eleventh Circuit concerning direct evidence, the "preponderance" definition ("evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic") and the "dictionary" definition ("evidence that, if believed, proves the existence of a fact in issue without inference or presumption"). *Wright*, 187 F.3d 1287, 1294. The *Wright* court concluded that the preponderance definition was the law of the Eleventh Circuit. Nevertheless, after *Wright*, panels of the Eleventh Circuit have continued to hold that the dictionary definition of direct

evidence is applicable. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087-88 (11th Cir. 2004).

Because of the inconsistencies as to the definition of direct evidence in the Eleventh Circuit panel opinions, there are published opinions with almost identical facts where one panel opinion holds that the evidence constitutes direct evidence and the other holds that it does not. *Compare Buckley v. Hospital Corp. of Am.*, 758 F.2d 1525, 1530 (11th Cir. 1985) (decision-maker's statement that the hospital needed "new blood" and that the plaintiff's advancing age impeded her constituted direct evidence in an age case) *with Damon v. Fleming Supermarkets, Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999) (decision-maker's statement that "what the company needed was aggressive, young men like [the younger person promoted] to be promoted" was not direct evidence). Bussell has similar evidence in this case, because of the admissions that she subject to sexual harassment , she was constructively discharged, and the direct evidence that she was retaliated against "not given the permanent position because she "complained too much" about sexual harassment).

Conflicting understandings of what constitutes "direct evidence" plague other circuits as well. In the First Circuit, "[c]omments which, fairly read, demonstrate that a decisionmaker made, or intended to make, employment decisions based on forbidden criteria constitute direct evidence of discrimination", constitute direct evidence. *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 61 (1st Cir. 2000)

The Third Circuit has noted that "while courts agree on what is *not* direct evidence—*e.g.*, statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other 'stray remarks'—there is no consensus on what is [direct evidence]." *Fakete v.*

Aetna, Inc., 308 F.3d 335, 338 (3d Cir. 2002).

In the Fifth Circuit, "direct and material evidence" of employment discrimination applies to remarks that are: "(1) related to [the protected class of persons of which plaintiff is a member]; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision; and (4) related to the employment decision at issue." *Vance v. Union Planter's Corp.*, 209 F.3d 438, 442 (5th Cir. 2000) (citing *Krystek v. University of S. Miss.*, 164 F.3d 251, 256 (5th Cir.1999)).

In the Sixth Circuit, while "[t]he Supreme Court has now made it clear that 'direct evidence' is not essential to prove a mixed-motive employment discrimination case,...the various employment-oriented definitions of direct evidence...have lingered on." *Peyton v. Kellermeyer Co.*, 115 Fed.Appx. 825, 829, n.1 (6th Cir. 2004). Another panel opinion noted that "[d]irect evidence 'is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000) (citing *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir.1999)).

The Seventh Circuit also presents a choice of definitions of "direct evidence": "Direct evidence is evidence which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption." *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001). At the same time, "[d]irect evidence is evidence that "'in and of itself suggests' that someone with managerial authority was 'animated by an illegal employment criterion.'" *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 670 (7th Cir. 2000) (citing *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th

Cir.1999) *and Venters v. City of Delphi,* 123 F.3d 956, 972 (7th Cir.1997)). Foreshadowing Justice Thomas' opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003), the Seventh Circuit has also noted that, where a plaintiff has presented sufficient evidence for a jury to conclude that the employer's decision was motivated by an illegal consideration, "the question [of] whether the bulk of [the plaintiff's] evidence of discrimination is direct or circumstantial ... is a distinction without legal consequence." *Mathur v. Board of Trustees of South. Ill. Univ.*, 207 F.3d 938, 942 (7th Cir. 2000).

Six years ago in the First Circuit, Judge Selya provided an analysis of the varying approaches the several circuits take toward defining direct evidence in *Fernandez v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 582 (1st Cir. 1999), dividing the definitions used by the courts as falling under one of three rubrics: A) "classic" ("evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence"); B) "animus plus" ("evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision"); and C) "animus" (evidence "that as long as [it] is tied to the alleged discriminatory animus, [ ] need not bear squarely on the challenged employment decision").

While Justice Thomas' opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003), made clear that direct evidence, however it is defined, is not needed for a plaintiff to obtain a mixed-motive jury instruction, the definition, use, and effect of direct evidence in the summary judgment context of employment discrimination cases remains unclear, with different circuits now rendering differing opinions concerning nearly identical evidence. In particular, because the definition of what constitutes direct evidence bears directly on a court's

decision to grant or deny summary judgment, as well as on whether a plaintiff must proceed under a *McDonnell Douglas* pretext framework, guidance as to the effect of properly-defined direct evidence on a defendant-employer's motion for summary judgment would substantially lighten the dockets of the federal courts.

II. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE PROOF NECESSARY TO ESTABLISH A CLAIM FOR SEXUAL HARASSMENT AND THE COURT SHOULD RESOLVE THE IMPORTANT BUT UNANSWERED QUESTION CONCERNING WHETHER SEXUAL ASSAULTS *PER SE* ESTABLISH A CLAIM OF SEXUAL HARASSMENT AND WHETHER A COMPANY'S OWN ADMISSION THAT SEXUAL HARASSMENT OCCURRED REQUIRES THAT SUMMARY JUDGMENT BE DENIED IN SUCH A CASE.

Part of proving sexual harassment requires a showing of unwelcome sexual harassment which was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999).

A review of the panel decision shows that it explained away the instances of sexual touchings individually, rather than viewing them collectively, but prior decisions of other courts of appeal have held that the totality of the work environment should be viewed when determining whether an employee has established a prima facie case of sexual harassment. *Raniola v. Bratton*, 243 F.3d 610 (2d Cir. 2001); *Connor v. Schrader-*

Bridgeport Int'l, Inc., 227 F.3d 179 (4th Cir. 2000); *Pryor v. Seyfarth Shaw*, 212 F.3d 976 (7th Cir. 2000); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001). Because the panel decision is in conflict with other circuits, Bussell requests that the Court resolve the conflict.

Sexual touchings are different from comments, and some circuits hold that the existence of them requires denial of summary judgment. *Holtz v. Rockefeller & Co.*, 258 F.2d 62 (2d Cir. 2001) (finding sexual harassment when the supervisor repeatedly touched the plaintiff's hand and hair, tried to look down her blouse and up her skirt, and made repeated sexual remarks); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (numerous instances of sexual touching but none were sexual assaults or involving genitalia, but sufficient for finding of sexual harassment); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798 (7th Cir. 2000) (forcibly kissing plaintiff by sticking his tongue down her throat and unfastening her bra *per se* sufficient to constitute sexual harassment); *EEOC v. Indiana Bell Tel. Co.*, 214 F.3d 813 (7th Cir. 2000) (finding sexual harassment when inappropriate touching, rubbing up against female, suggestive comments, and an instance of exposing himself to the plaintiff); *Moring v. Arkansas Dep't of Correction*, 243 F.3d 452 (8th Cir. 2001) (finding sexual harassment when harasser entered hotel room during business trip in his boxer shorts, refused to leave, put his hand on her thigh, and attempted to kiss her); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000) (finding sexual harassment when harasser groped her, and on one occasion rubbed his pelvis up against her backside, and shoved a broom handle into the crotch area between her legs); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238 (10th Cir. 2001) (upholding sexual harassment finding for a one time sexual assault). Bussell respectfully requests that the Court resolve these conflicts, as these decisions are in conflict with the panel

decision in this case. Moreover, the extent of the sexual assaults that Bussell was forced to endure were far more severe than the touchings in the cases finding that the plaintiff established a prima facie case of sexual harassment.

The Panel decision also discounts the sexually harassing conduct by finding that where "the conduct complained of is equally offensive to male and female workers . . . [t]he sexual harassment would not be based on sex because men and women are accorded like treatment". *Panel Decision* at 9 (citing *Cross v. State of Ala.*, 49 F.3d 1490, 1504 (11th Cir. 1995)). This holding makes no sense. A reasonable jury could find that Render sexually harassed Bussell to gratify his own filthy sexual desires. The fact that a male worker also thought the comments were inappropriate, or overheard the comments does not mean that Bussell was not sexually harassed. A contrary holding means that every time a female is subjected to sexual harassment , as long as a male also witnessed the harassment and found it offensive, the employer would have a complete bar to a sexual harassment claim. That is completely in conflict with *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998), which provides the only defense to a sexual harassment case. Thus, the Panel decision improperly relies on the *Cross* case which was overruled by *Faragher*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November, 2005

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12120

D.C. Docket No. 02-60019-CV-SH

Meghan BUSSELL,

Plaintiff-Appellant,

versus

MOTOROLA, INC.,
a Delaware Corporation,
ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

(July 13, 2005)

Before DUBINA, PRYOR and RONEY, Circuit Judges.

PER CURIAM:

Appealing the district court's grant of summary judgment to defendants Motorola, Inc. and Adecco Employment Services, plaintiff Meghan Bussell claims that genuine issues of material fact exist as to her hostile work environment/sexual harassment and retaliation claims

under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, *et seq.* and the Florida Civil Rights Act, as codified in Chapter 760 of the Florida Statutes. We affirm.

The following detailed facts, primarily taken from Bussell's deposition, are viewed in the light most favorable to her. Adecco is a staffing company that provides temporary employees to corporate clients. Motorola was one of Adecco's clients. On May 3, 2000, Adecco hired Bussell, then 19 years old, as a temporary employee to work at Motorola's assembling factory in Plantation, Florida. Bussell's job duties primarily included assembling and repairing two-way radios and cellular phones, and assisting with quality control and other special projects. Bussell's immediate Adecco supervisor was Tom Karge and her Motorola immediate supervisor was Laila Pennington.

In August 2000, Bussell voluntarily requested to be transferred from the third shift (night shift) in the "Iden" Center to the first shift (morning shift) in the "Inpact" Center, which was approved by management. The work area was cramped and "tight." One Motorola employee who worked in the first shift was Bob Render, who was in his "mid-fifties." When Bussell joined that shift, she immediately felt uncomfortable around Render, finding him offensive and vulgar. She noticed that he made demeaning comments about women, and testified that Render was "always demeaning someone." He bragged to various Inpact Center employees about cheating on his wife and frequenting strip clubs. Bussell complained to her Motorola supervisor, Laila Pennington, in late August that Render's behavior was making her "uncomfortable" and that his comments were unwelcome. She did not complain to her Adecco supervisor at that time. Although Render

made "inappropriate" comments that made Bussell feel "uncomfortable," including comments on the way she looked and dressed, she did not believe she was "sexually harassed" until October 2000.

Bussell testified that in October 2000, while she was bending over to pick up radios, she "felt [Render] pulling the back of my pants down and the top of my shirt up, and like pulling – I mean, like, not just pulling a little bit, like grabbing down and yanking my shirt up and saying along the lines of nice tattoo, and I freaked out." Bussell sat down at her workstation and had a "conversation about how [she] was really upset by it" with a co-worker "for a second" and then went to Pennington's office and began "yelling" to her about the incident.

"Within the same week" of the incident, Karge and Pennington held a meeting for the "entire department," approximately 30 or 40 workers, where they reinforced the policy that there should be "no touching" or "talk[ing] dirty" in the workplace. Bussell testified that Pennington stated in the meeting that "if this happens again, it would be dealt with immediately and we won't tolerate it. We have a zero tolerance for it . . . and that Motorola and Adecco had policies for sexual harassment and that we would have to abide by them." Bussell felt embarrassed during that meeting, and although she was not mentioned by name, she believed that all the employees in the meeting knew that they were talking about her. About one week after that meeting, supervisors spoke with Render, and he denied that the situation had occurred.

Bussell testified that once she had complained about this incident, Pennington retaliated against her by trying to get her "in trouble" with Karge, her Adecco Supervisor,

and by conveying to Karge that she was a cry baby, and a liar. She claims that Pennington retaliated against her by assigning her an increased workload and "constantly yelling at" her. Bussell testified that the increased workload did not occur immediately after she complained about the incident with Render but instead occurred around two or a "few" weeks thereafter. After that, she noticed that "three boxes of phones" were "dumped" on her desk that she needed "to take care of."

After the "entire" department meeting, Bussell noticed Render "constantly," approximately 10-15 total times between November and December 2000, "having to walk behind my desk and rub his crotch against [her] back as he walked by, as if there was not enough room for him to get through." Bussell chose to complain only to Karge because she felt that Pennington called her a "liar" or a "baby" too much. Bussell testified, however, that she "had to tell [Pennington] what was going on" when Karge was on vacation. According to Bussell's handwritten notes, Render also made several comments to her that were "sexual in nature," including: (1) the shape of her body, including the way her clothing "compliments" it; (2) the reason why her hair grew so fast was because she must have been sexually active; and (3) she should not be with her younger boyfriend when she "could have a man" like him. Bussell did not, however, complain to management that she had been sexually harassed. In December, Bussell got "fed up," and jammed the back of her chair into Render. Render never touched Bussell again.

Bussell also had an unwelcomed experience with coworker Jason Wells. With approximately one minute left in a work day in "either late October, [or] early November" 2000, and while the shift workers were getting ready to leave,

Wells walked behind Bussell, grabbed her inappropriately and began tickling her. Bussell immediately reported it to supervisors Laila Pennington and Tom Karge. Bussell testified that after she had complained to Pennington, Wells never touched or said anything inappropriate to her again. Bussell admits that none of the other employees in the Inpact Center witnessed any of the alleged touching by Render or Wells.

On December 26 or 27, 2000, Render called Bussell a "stupid girl," which precipitated Bussell yelling profanity at Render. Bussell went to Karge and the two went to Motorola's Human Resources Department and met with administrator Marcy Covington, at which time Covington notified Bussell that she would be "written up" for cursing in the workplace. It was at this time that Bussell then complained to Covington that she had been sexually harassed. Covington began an investigation, interviewing Bussell, Render and other Motorola and Adecco employees from the Inpact Center. Motorola concluded that Render, who had not previously had any complaints lodged against him, had used inappropriate language in the workplace but had not sexually harassed Bussell. Render was given a written warning, was transferred to a different department, and was placed on a one-year probationary period, which precluded him from receiving a salary increase, promotion, or transfer during that period. Bussell was dissatisfied with Render's punishment and believed that he should have been fired.

Motorola scheduled and held mandatory sexual harassment training for Render and all the employees in the Inpact Center. Bussell testified that once she complained on or about December 27, 2000 to Motorola's Covington that she had been "sexually harassed," she did

not experience any further incidents of sexual harassment. On January 24 or 26, 2001, Motorola held that mandatory sexual harassment training for all employees in the Inpact Center, including Bussell. Bussell felt that management's compelling her to attend this "four-hour" training session was "unnecessary" and in "retaliation" for her making sexual harassment complaints.

After she attended the mandatory training, she went to Karge and gave him a letter to take to Motorola's Human Resources Department. Bussell testified that Karge had refused to take the letter to the Human Resources Department. She stated the following, "He told me to stop, to get over it or get a new job. He told me to get a lawyer. He told me that if I got a lawyer, he would help me and he would testify for me as long as I didn't sue Adecco. As long as I only went after Motorola, he was going to be there for me 100 percent." She further stated that Karge gave her three options: (1) to move to Render's department; (2) stay in her current position where Pennington was the Motorola supervisor; or (3) she can find new employment. At that time, Karge also informed Bussell about a job opportunity with United Healthcare. She testified, "[B]ut what he told me was you had three choices, and of those three choices the only one that was rational was to get another job." Her last day of employment at Motorola was January 31, 2001. She found other employment immediately thereafter with CIGNA, which Adecco had facilitated for her. Bussell testified that she had wanted to become a full-time Motorola employee but that it did not come to pass because, she contended, that Motorola was tired of her complaining. According to Bussell, only a "couple" of Adecco employees were hired as permanent employees of Motorola and no Motorola management

member had ever told her that they did not hire her because she was a complainer.

The district court held that Bussell had failed to set forth a prima facie case for workplace sexual harassment under Title VII and the Florida Civil Rights Act because the alleged behavior: (1) was not "so frequent, severe, or pervasive to constitute actionable sexual harassment;" (2) was not something the "jury could construe as a pattern of extensive uninhibited sexual threats or conduct that permeated her work environment"; and (3) did not "alter[] her terms or conditions of employment." The district court further held that Bussell had failed to demonstrate a prima facie case for retaliation, reasoning that she had neglected to show "an adverse employment action as a matter of law and . . . that she suffered an adverse employment decision on the part of either Adecco or Motorola." The district also concluded that her claim that she was constructively discharged failed because at the time she left Motorola, "by her own admission, the alleged sexual harassment had stopped."

On appeal, Bussell essentially argues that the district court misread the record and misconstrued the evidence. A careful review of the record on appeal, however, indicates that Bussell's brief represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record.

1. Claim for Hostile Work Environment and Sexual Harassment.

There was no error in granting summary judgment to both Adecco and Motorola on the ground that Bussell did not establish a prima facie case of hostile environment or

sexual harassment. There is no record evidence that the harassment for which Bussell complained was sufficiently severe or pervasive to alter the conditions of the employment and create a discriminatorily abusive working environment, in view of the precedents cited by Appellees. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582-83 (11th Cir. 2000) (listing elements for prima facie case). Render made several inappropriate, crass comments, including his talk of frequenting strip clubs and about his sex life, to several workers, both male and female, in the Inpact Center. *See, e.g., Cross v. State of Ala., Dept. of Mental Health*, 49 F.3d 1490, 1504 (11th Cir. 1995) ("noting that where the conduct complained of is equally offensive to male and female workers . . . [t]he sexual harassment would not be based on sex because men and women are accorded like treatment") (internal citation and quotation omitted). Moreover, because Render's boorish comments made directly to Bussell about her "thick" lips and that her younger boyfriend was a "dog" were not based on her sex, they are not evidence of sexual harassment. *See Gupta*, 212 F.3d at 583-84.

The lifting of the back of her shirt up and pulling of her pants down to view the tattoo, which precipitated Render's comment of "nice ink" or "nice tattoo," was a single incident and not sufficiently severe or pervasive to alter the work environment. Render made no sexually suggestive comments to Bussell while commenting on the tattoo. *See Gupta*, 21 F.3d at 585 (finding no sexual harassment where coworker placed hand on plaintiff's knee once and touched hem of her dress once, when the touching was only "momentary" and not coupled by any "verbal suggestions or advances"). As to the 10 to 15 instances over a two-month period of rubbing against

Bussell's upper back as Render passed by her while working in the cramped and "tight," work area as Bussell testified, this too fails. In December, Bussell got "fed up," and jammed the back of her chair into Render, which ceased Render's alleged behavior. Unlike other cases in this Court, such as *Hulsey v. Pride Rest., LLC*, 367 F.3d 1238 (11th Cir. 2004), where alleged sexual activities of a *supervisor* occurred over a concentrated time period, these activities occurred over a two-month period. Bussell neither identifies, nor have we found, an analogous holding that such alleged behavior is sufficiently severe or pervasive to constitute a hostile workplace sexual harassment claim. Likewise, Bussell's isolated complaint against coworker Jason Wells fails on this ground as well.

2. Claim for Retaliation and Constructive Discharge.

The district court did not err by entering summary judgment for the defendants on Bussell's retaliation and constructive discharge claims. In order to set forth a retaliation claim, a Title VII plaintiff must show that (1) she participated in a protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between that protected activity and the adverse employment decision. *See Gupta*, 212 F.3d at 587. Here, there is no record evidence to support Bussell suffered from an adverse employment action by either of the defendants. We affirm this issue for the reasons set forth in the district court's order.

There is no record evidence to support a constructive discharge claim. A constructive discharge occurs when a discriminatory employer imposes working conditions that

are so intolerable that a reasonable person in the employee's position would have been compelled to resign. *See Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997). Bussell testified that at the time she resigned from Motorola, the sexual harassment had already stopped. There is no record evidence that she was compelled to leave Motorola at that time.

The district court's grant of summary judgment to the defendants is **AFFIRMED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-60019-CIV-HIGHSMITH

MEGHAN BUSSELL,

Plaintiff,

v.

MOTOROLA, INC., a Delaware corporation, and ADECCO EMPLOYMENT SERVICES, INC., a Delaware corporation,

Defendants. /

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

(Filed Mar. 29, 2004)

THIS CAUSE is before the Court on Adecco Employment Services, Inc.'s Motion For Summary Judgment (DE #68) and Motorola, Inc.'s Motion For Final Summary Judgment (DE #75). Oral argument on these motions was held on August 22, 2003. Having carefully considered the filings, the evidence submitted in support thereof, oral argument of counsel, the court file and applicable law, the undersigned is of the opinion that summary judgment should be granted in this case.

INTRODUCTION

This case is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 et seq. ("Title VII"), and the Florida Civil Rights Act of 1992, as established at Florida Statutes Chapter 760 ("FCRA"). Plaintiff, Meghan

Bussell, alleges hostile work environment/sexual harassment and retaliation (DE #1).

In May 2000, Bussell was hired by Adecco Employment Services, Inc. ("Adecco"), an employment agency, and worked as an assembler building cell phones at Motorola Inc.'s Plantation facility. At the time she was hired and worked at Motorola, Bussell was 19 years old. Plaintiff claims that from October 2000 until January 2001, she was exposed to a sexually harassing work environment and retaliated against after she complained. Bussell alleges that two co-workers improperly touched her and that one co-worker made improper comments (DE #41). Bussell claims that as a direct and proximate result of these actions, she was forced to resign and has suffered emotional pain, suffering, loss of enjoyment of life, and loss of past and future wages and benefits.[1] Plaintiff seeks compensatory and punitive damages as well as attorney's fees and costs. Defendants contend, among other things, that plaintiff's allegations lack' substantive merit entitling them to judgment as a matter of law.

FACTS

Construing the facts in the light most favorable to Bussell, the following is Plaintiff's story. Bussell worked in a small crowded room with other assemblers and technicians at Motorola building cell phones and performing other related tasks.

[1] "I mean, this is like, I was 19. I was supposed to be a kid and instead I'm stuck in my house crying all the time because some asshole touched me and my two supervisors wouldn't help me." Bussell Depo. At 244.

Although she worked on-site at Motorola, Bussell was an Adecco employee. During all material times, Bussell's Adecco immediate supervisor was Tom Karge and her Motorola immediate supervisor was Laila Pennington.

Bob Render, a Motorola employee in his mid-50's, worked as a technician in Motorola's Inpact Center. When Bussell joined that department in late August 2000, Bussell was immediately uncomfortable around Render because he frequently complimented her, which compliments, while innocuous, were unwelcome. Bussell found Render offensive – he talked loudly, he used vulgar language, he made demeaning comments about women's bodies in general, and he bragged to various Inpact Center employees about his social life, which included cheating on his wife and visiting strip clubs.

At that time, in late August 2000, Bussell complained to Pennington that Render's comments were repugnant and his compliments unwelcome, but Bussell did not consider herself to be sexually harassed at that time. Bussell Depo. At 57-61. Moreover, Bussell acknowledges that Render's comments, other than compliments made specifically to her, were addressed to the technicians who sat near him or anyone else in the room who would listen.

Then, in October 2000, Render, who was behind Bussell when she was bending over, pulled Bussell's shirt up and the back waist of her pants down to expose a large tattoo across the lower half of Bussell's back. Bussell is uncertain what Render said when he did this, but it was something along the lines of "nice tattoo" or "nice ink." Bussell Depo. At 78, 109. At that time, Render did not otherwise touch Bussell, and he did not make any other comments. No one saw (or was willing to say they saw) the

incident. Bussell was extremely upset and immediately reported the incident to Pennington.[2]

Within one week, all the employees at the Inpact Center were presented with a review of Motorola's sexual harassment policy. Pennington stated that Motorola had a "zero tolerance" sexual harassment policy. Bussell Depo. At 70-74. Bussell was dissatisfied with the way her supervisors dealt with the incident because she felt singled out and labeled as a trouble maker and "cry baby." Coworkers after the announcement made fun of her, "like somebody walked by, oh, I'm going to touch you. Oh, oh, be careful, that might be sexual harassment." Bussell Depo. At 71.

After the review of Motorola's sexual harassment policy, Render began a habit of "rub[bing] his crotch up against [Bussell's] back as he walked by, as if there was not enough room for him to get through."[3] Bussell Depo. At 81. Bussell complained to Karge and not Pennington about this behavior because she felt Pennington would just "scream" at her and call her "a liar" or "a baby." Bussell Depo. At 197. This "rubbing" occurred approximately 10-15 times during November and December until finally, Bussell got "fed up," and jammed the back of her chair into Render. After that, Render did not touch Bussell in any manner again.

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[2] "I'm sure people heard me when I was complaining to Laila because I was upset and I was yelling about what had happened." Bussell Depo. At 73, 75.

[3] "But I would be sitting down and he would walk by and I could feel his pants and the contents rubbing up against my shoulder. I would turn around and he would wink at me funny or smile at me funny, and I would get grossed out." Bussell Depo. At 305-06.

Also, during November and December 2000, Render made it a habit to compliment Bussell's body multiple times a day. For instance, he would comment on her thick lips or tell her how nice her blouse looked. A couple of times he commented on how fast her hair was growing and stated that she must be sexually active. Twice he asked her why she would choose to be with a boy (referring to her same age boyfriend with whom she lived) when she could have a man just like him.

Sometime after October 2000, but before December 2000, Bussell also had a problem with an employee named Jason Wells. On one occasion, Wells came up from behind her, grabbed her underneath her chest, and started tickling her. According to plaintiff, Wells said, "I bet your daddy touched you like that when you were a little girl and you liked it." Plaintiff complained first to Pennington and then to Karge. They both said they would look into it, but neither got back to Bussell regarding the incident. Wells never touched Bussell or said anything offensive to her again. These incidents and comments by Render and Wells constitute Bussell's entire sexual harassment claim.

On December 26, 2000, Bussell got into an argument with Render. Render turned off the radio when a song she liked was playing. Bussell asked Render why he turned the radio off and he replied by calling her a "stupid girl." Bussell responded in anger and cursed extensively at Render. Karge took Bussell to Motorola's Human Resources Department ("HR") where Bussell proceeded to get "written up" for cursing. Bussell was stunned to find out at that time that neither Pennington nor Karge had ever reported her numerous complaints about Render or Wells to HR. After Bussell made her complaints known to HR, Bussell was asked if she was comfortable returning to the

Inpact Center and she said "yes." Moreover, Bussell never asked to be moved out of the Inpact Center.

Motorola immediately commenced an investigation of Bussell's sexual harassment allegations. Marcy Covington, Motorola's HR Administrator, interviewed Bussell, Render and several other Motorola and Adecco employees from the Inpact Center.

Ultimately, no witnesses corroborated Bussell's claims regarding inappropriate touching and sexual harassment.[4] Motorola concluded that Render had "used inappropriate, foul and abusive language intimidating others in the conversations" he was holding, but that he had not engaged in sexual harassment.[5] Render apologized and Motorola ultimately placed him on a one-year probation and gave him a written warning, which precluded Render from receiving a salary increase, promotion, or transfer during that period. Render was also moved out of the Inpact Center and transferred to a different department. Finally, Motorola scheduled and held mandatory sexual harassment training for all employees in the Inpact Center.

Bussell was informed of Motorola's findings and decision by Karge. Bussell was dissatisfied with the length of time it took Motorola to complete its investigation and make its decision. She also felt that Render should have

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[4] "Marcy spoke with Betty McClain. Betty sits next to Meghan. Betty stated that she never heard Meghan and Bob talk to each other. She stated that she never witnesse[d] or heard the two of them arguing. Betty stated that she never witnessed Bob touching Meghan." Plaintiff's Ex. 10, Investigation Notes.

[5] Plaintiff's Ex. 20.

been fired and that her supervisors should have been punished for their callous[6] or unresponsive actions. Once her complaints became known to Motorola's HR department in late-December 2000, Bussell did not experience any further incidents of sexual harassment.

Retaliation

Plaintiff claims that the harassment culminated in numerous types of adverse employment action: denial of promotion to Motorola employee with higher pay and benefits, being sent home without pay, assigning her an inordinate amount of work, screaming and yelling at her in front of others for no reason, and termination.

Bussell claims that once she complained about the tattoo incident, Pennington retaliated against her by trying to get her in trouble with her Adecco supervisor by telling him on a regular basis that she was a liar, a cry baby, and a trouble maker. Bussell Depo. At 197, 294. Bussell also claims that Pennington retaliated against her by giving her significantly more work to do. According to Bussell, it was also retaliatory to require her to attend a sexual harassment training class with the other Inpact Center employees. She felt the class was "unnecessary" for her and "humiliating and hurtful." Bussell Depo. At 328.

She also thought it was wrong that she was required to attend the first scheduled class and Render and Wells were allowed to attend the second session scheduled a week or two later.

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[6] Bussell was "hurt and offended" by Pennington because Pennington did not believe her when she told Pennington about the harassment she was experiencing. Bussell Depo. At 295.

After she attended the mandatory sexual harassment training, Bussell went to Karge to present him with a letter to take to Motorola's Human Resource Department. According to Bussell, Karge informed her that he would not take any additional notes to HR, that Motorola's investigation was over and "[Motorola] had done all [it was] going to do." Bussell Depo. At 126. Karge allegedly told Bussell that "they had made their decision, they were sick of the notes and they were sick of [her] complaining." Bussell Depo. At 255-56.

Bussell claims Karge told her that she had three choices: stay in the department with Pennington, transfer to the department with Render, or leave Motorola by quitting. At that time, Karge also told Bussell about an Adecco job opportunity with United Healthcare. Bussell could no longer deal with Pennington's "constant yelling and name calling" or with seeing Render in the hallways or cafeteria. Bussell claims that this work environment was so abusive that she felt compelled to quit and that she was constructively discharged. Bussell's last day at Motorola was January 21, 2001. She was able to immediately obtain a job at CIGNA that Adecco obtained for her. She did not like the CIGNA position, however, so she subsequently obtained a permanent position at United Healthcare.

STANDARD OF REVIEW

The court, in reviewing a motion for summary judgment, is guided by the standard set forth in Federal Rule of Civil Procedure 56(c), which states, in relevant part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The moving party bears the burden of meeting this exacting standard. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). That is, "[t]he moving party bears 'the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (quoting *Celotex*, 477 U.S. at 323). In assessing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the non-moving party. *See Batey v. Stone*, 24 F.3d 1330, 1333 (11th Cir. 1994); *See also Sheckells v. Agv-Usa Corp.*, 987 F.2d 1532, 1534 (11th Cir. 1993); *Browning v. Peyton*, 918 F.2d 1516, 1520 (11th Cir. 1990).

Summary judgment is appropriate when there is no dispute as to any material fact and only questions of law remain. *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997). If the record presents factual issues, the court must deny the motion and proceed to trial. *Adickes*, 398 U.S. at 157; *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Despite these presumptions in favor of the non moving party, the court must be mindful of the purpose of Rule 56 which is to eliminate the needless delay and expense to the parties and to the court occasioned by an unnecessary trial. *Celotex,* 477 U.S. at 322-323. Consequently, the non-moving party cannot merely rest upon her bare assertions, conclusory allegations, surmises or conjectures. *Id.* As the Supreme Court noted in *Celotex,*

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against the party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Id. at 322-323. Thus, the mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient. There must be evidence on which the jury could reasonably find for the non-movant. *Anderson,* 477 U.S. at 251; *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). Whether the misbehavior complained of amounts to a hostile sexual environment is a matter for this Court to decide under Rule 56.

DISCUSSION

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)1. It expressly prohibits refusing to hire or discharging an

employee based on a prohibited factor. *Id.* Likewise, Title VII also expressly provides that "[i]t shall be an unlawful employment practice for an employer . . . otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

Title VII does not mention sexual harassment. Nevertheless, the Supreme Court and the Eleventh Circuit Court of Appeals recognize that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatory hostile or abusive environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citations omitted); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999).

Although Title VII's prohibition of discrimination clearly includes sexual harassment, binding case law is quick to point out that Title VII is not a federal "civility code." *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious)," do not rise to the level of federally prohibited employment discrimination.)

There are two types of sexual harassment cases: (1) quid pro quo, which are "based on threats which are carried out" or fulfilled, and (2) hostile environment, which are based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)). Bussell complains of only the latter.

The complaint contains 4 counts:

(1) Title VII Hostile Work Environment Sexual Harassment.

(2) Retaliation in Violation of Title VII.

(3) FCRA Hostile Work Environment Sexual Harassment.

(4) Retaliation in Violation of FCRA.

Plaintiff's evidence of alleged sexual harassment consists of:

- the tattoo incident involving Render;
- the tickling incident involving Wells;
- approximately 10-15 instances of Render rubbing his groin against her while passing behind her; and
- sexual comments made by Render;

Plaintiff's evidence of alleged retaliation consists of:

- an increased workload far beyond that of anyone else in her department;
- being constantly yelled at and called a liar;

- Motorola taking an excessive amount of time to complete its investigation;
- being required to attend a sexual harassment seminar; and
- coworkers making sarcastic remarks regarding sexual harassment in the workplace after the sexual harassment seminar.

Complaint ¶¶ 27-48.

I. Hostile Environment Sexual Harassment (Counts I and III of the Complaint)

Hostile environment sexual harassment claims are claims based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Gupta*, 212 F.3d at 582 (citing *Burlington*, 524 U.S. 742 (1998)). In *Mendoza*, the Eleventh Circuit outlined the following elements as essential in establishing a claim for hostile environment sexual harassment under Title VII: An employee must show

(1) that he or she belongs to a protected group;

(2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;

(3) that the harassment must have been based on the sex of the employee;

(4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of the employment and create a discriminatorily abusive working environment; and

(5) a basis for holding the employer liable.

Mendoza, 195 F.3d at 1245 (citations omitted). The fourth factor "is the element that tests the mettle of most sexual harassment claims." *Gupta*, 212 F.3d at 583. To ensure that Title VII does not turn into a legally mandated civility code, plaintiffs must demonstrate that the harassment of which they complain was sufficiently severe or pervasive to alter the terms and conditions of the employment and create a discriminatorily abusive working environment. *Id.* Indeed, this requirement

> is regarded 'as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation for discriminatory 'conditions of employment'.'

Id. (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)). In analyzing a workplace as a whole, the environment of which a plaintiff complains must be one that "a reasonable person would find hostile or abusive" and the "the victim . . . subjectively perceive[s] . . . to be abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, (1993); *Mendoza*, 195 F.3d at 1246.

The Supreme Court and the Eleventh Circuit require the Court to consider the following factors when determining whether the alleged harassment objectively altered a plaintiff's terms or conditions of employment:

(1) the frequency of the conduct;

(2) the severity of the conduct;

(3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and

> (4) whether the conduct unreasonably interferes with the employee's job performance.

Mendoza, 195 F.3d at 1246 (citations omitted),

When determining whether alleged statements or conduct reach the required level of severity or pervasiveness to constitute sexual harassment, the Court should consider sexual or gender related conduct only. *Gupta*, 212 F.3d at 583. Because "[i]nnocuous statements or conduct, or boorish ones that do not relate to the sex of the actor or the offended party (the plaintiff), are not counted." Render's vulgar comments made in general to anyone who would listen at the Inpact Center do not qualify for consideration under a sexual harassment claim. *Id.* Moreover,

> [a]s the case law has grown to show, determining the intensity/quality of sexual gesturing, touching, bantering and innuendo that it takes to render a work environment sexually hostile is now no less difficult than "trying to nail a jellyfish to the wall."

Breda v. Wolf Camera, Inc., 148 F.Supp.2d 1371, 1377 (S.D. Ga, 2001) (*quoting Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

Unwanted Attention and Bothersome Remarks

In her complaint, the following acts or incidents between her and her coworkers relate to a claim of sexual harassment. Bussell claims that she was subjected to unwanted and inappropriate touching

(1) when Render lifted her shirt and lowered her pants to expose the tattoo on her lower back;

(2) when Wells tickled her; and

(3) when on approximately 10-15 occasions Render rubbed his genital area against Bussell when he passed behind her.

Bussell, of course, also subjectively perceived Render's comments about her body and her boyfriend to be abusive.[7]

At her deposition, defendant's counsel asked Bussell to elaborate on the incidents alleged above. Defendant's counsel ascertained that Bussell's testimony is vague or inconsistent regarding the number of times Render complimented her or rubbed against her.

While the unwanted attention alleged is certainly offensive and reprehensible, it does not support a finding that from an objective viewpoint such behavior was so frequent, severe, or pervasive to constitute actionable sexual harassment under Title VII or the FCRA. Bussell does not allege behavior that a jury could construe as a pattern of extensive uninhibited sexual threats or conduct that permeated her work environment. Moreover, Bussell has not shown how the alleged harassment altered her terms or conditions of employment.

In *Breda v. Wolf Camera, Inc.*, 148 F.Supp.2d 1371, 1374 (S.D. Ga. 2001), the Court found that the plaintiff failed to state a claim for a sexually harassing hostile work

[7] The Court disregards those assertions of fact alleged by Plaintiff's counsel which are exaggerations or mischaracterizations of the record evidence. *E.g.*, *see* DE #122, footnote 1.

environment, despite a lengthy list of allegations relating to actions and comments by co-workers.[8] The *Breda* Court stated that "the above-described conduct is juvenile, offensive, and at times even mean-spirited, but merely inserting every last rude or sexualized comment/gesture/joke into a lengthy list accumulated over years of employment does not, under *Mendoza* or *Gupta*, a Title VII claim make." *Breda,* 148 F. Supp.2d at 1381.

According Bussell all reasonable inference, the Court must conclude that she has not met the "sufficiently severe" keystone binding precedent and sister courts have deemed actionable for a claim of sexual harassment. After sifting out Render's offensive comments that were not directed at Bussell or comments that were not of a sexual nature, all that is left is a case which, while it reflects co-employee sexual harassment, alleges actions or behaviors that are not physically threatening or so humiliating as to constitute sexual harassment under FCRA or Title VII as

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[8] In *Breda,* the plaintiff claimed, inter alia, that a male co-worker made inappropriate remarks (telling her that she only made sales because the male customers wanted to date her and have sex with her; asserting that women try to trap men by getting pregnant) asked her if she was going to be "an Italian, feminist bitch" like two former female employees; wrote a poem stating that all women were bitches and asked the plaintiff what she thought of it) and engaged in unwanted and offensive touching (including placing his head on her shoulder approximately seven times, intentionally pushing the plaintiff twice, crowding or "sandwiching" the plaintiff with another male co-worker by standing in extremely close proximity to her); telling vulgar jokes and asking the plaintiff on five occasions to retrieve keys from his front pants pocket; noting that the plaintiff was dating a black man because she "liked to have a little black in her; making sexual comments about all other women in the mall; stating that the plaintiff took sales away from him and that he did not like competing with a "bitch." 148 F.Supp.2d at 1380-81.

defined by the Eleventh Circuit in both *Mendoza* and *Gupta*. As a matter of law plaintiff's claim for hostile work environment sexual harassment must therefore fail.[9]

II. Retaliation (Counts II and IV of the Complaint)

In order to establish a prima facie case of retaliation, Bussell must show:

(1) she participated in an activity protected by Title VII;

(2) she suffered an adverse employment action; and

(3) there is a causal connection between the participation in the protected activity and the adverse employment decision.

Gupta, 212 F.3d at 587.

An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." *Gupta*, 212 F.3d at 587, citing *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997). Conduct that falls short of an ultimate employment decision must meet "some threshold

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[9] Plaintiff asserted during oral argument that the defendants are liable because Karge and Pennington did not go up the chain of command to Motorola's Human Resources Department once they were notified of Bussell's complaints. While the Court finds competent evidence demonstrating that both defendants reacted adequately to Bussell's complaints, this issue is moot since there was no sexually hostile environment to report.

level of substantiality . . . to be cognizable under the anti-retaliation clause." *Gupta*, 212 F.3d at 587, citing *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998); *See also Munday v. Waste Mgmt. of N. America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998) (yelling at plaintiff during a meeting coupled with other conduct does not rise to level of adverse employment action); *Malladi v. Brown*, 987 F. Supp. 893, 917 (M.D. Ala. 1997), *aff'd*, 150 F.3d 1197 (11th Cir. 1998) (allegations that shouting at plaintiff in front of her subordinates amounts to adverse action is "without merit").

The actions alleged by Bussell must be "objectively serious and tangible enough" to alter her "compensation, terms, conditions, or privileges of employment, deprive . . . her of employment opportunities or adversely affect . . . her status as an employee" in order to establish a *prima facie* case of discriminatory retaliation. *See Gupta*, 212 F.3d at 588, citing *Robinson*, 120 F.3d at 1300. In addition, the Court must evaluate each alleged adverse action in light of any "legitimate, non-discriminatory reason" for the action articulated by the employer. If the employer articulates a non-discriminatory reason for the action taken, then the plaintiff must present "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action." *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998).

Adverse Employment Actions

In her complaint and filings, the following actions are cited as evidence of retaliation in violation of Title VII and FCRA:

(1) an increased workload far beyond that of anyone else in her department;

(2) being constantly yelled at and called a liar;

(3) Motorola taking an excessive amount of time to complete its investigation;

(4) being required to attend a sexual harassment seminar; and

(5) coworkers making sarcastic remarks regarding sexual harassment in the workplace after the sexual harassment seminar.

None of these acts rise to the level of adverse employment actions as a matter of law. Moreover, no evidence is presented to show that Bussell suffered from an adverse employment decision on the part of either Adecco or Motorola. *Gupta*, 212 F.3d at 587.

It is undisputed that Bussell never spoke with anyone at Motorola before deciding to resign. Bussell Depo. At 256. It is also undisputed that Bussell resigned from her Adecco employment at Motorola, but immediately commenced a job at CIGNA that Adecco obtained for her. Bussell also admits that, before she resigned from her Adecco employment at Motorola, Karge advised her of a permanent position at United Healthcare. Bussell subsequently obtained the permanent position at United Healthcare.

Additionally, there is no evidence that Bussell was denied a permanent position at Motorola. Evidence has been submitted which shows that Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she may have wanted or even expected to receive a permanent position at some time in the future is irrelevant. Bussell's assertion that she was constructively discharged is also without merit. At the time she resigned from Motorola, by her own admission, the alleged sexual harassment had stopped.

CONCLUSION

Bussell has failed to show that she can establish a *prima facie* case of sexual harassment or discriminatory retaliation. There exists no genuine issue of material fact, since Bussell's complete failure of proof concerning essential elements of her case necessarily renders all other facts immaterial.

Therefore, upon consideration of the defendants' motion for summary judgment, the undisputed facts, and applicable law, it is

ORDERED AND ADJUDGED that Adecco Employment Services, Inc.'s Motion For Summary Judgment (DE #68) is GRANTED and Motorola, Inc.'s Motion For Final Summary Judgment (DE #75) is GRANTED. In accordance with Fed.R.Civ.P. 58, final judgment will be entered by separate order. Thereafter the Clerk shall close this case and declare any pending motions at that time to be denied as moot.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 29 day of March, 2004.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES
DISTRICT JUDGE

cc: All counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12120-HH

MEGHAN BUSSELL,

Plaintiff-Appellant

versus

MOTOROLA, INC.,
a Delaware Corporation,
ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware Corporation

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Sep. 2, 2005)

Before: DUBINA, PRYOR and RONEY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
UNITED STATES
CIRCUIT JUDGE

No. 05-1051

FILED
JUN 9 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

MOTOROLA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ADECCO USA, INC.

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QUESTIONS PRESENTED

1. Whether this case presents an appropriate vehicle for resolving the conflict among the lower federal courts regarding the proper standard of "direct evidence" to be applied in employment discrimination cases?

2. Whether Petitioner's assertion that there is a conflict among the lower courts regarding the applicable standard for sexual harassment claims is illusory?

3. Whether the existing standard for sexual harassment claims obviates the adoption of a per se rule that sexual assault and touching constitute sexual harassment?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Adecco USA, Inc., is wholly owned by Adecco, Inc. and its ultimate parent is Adecco SA, a foreign corporation.

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INTRODUCTION

This case is not an appropriate vehicle to resolve the first issue advanced by Petitioner-namely, the existing split among the federal courts concerning the proper standard of "direct evidence" to be applied within the context of an employment discrimination case. The principal reason that this matter is not properly postured to resolve this conflict is that the evidence which Petitioner relies upon as direct evidence of retaliation is in fact inadmissible hearsay. Furthermore, Petitioner never raised or argued to the courts below that she had any direct evidence of constructive discharge or sexual harassment and, accordingly, she is precluded from making such an assertion at this time.

As to the second issue stated in the petition, there is in fact no conflict among the circuits or states concerning the standard to be applied to determine whether a hostile work environment exists. Furthermore, Petitioner's request that a per se rule be adopted whenever a "sexual assault" and/or "touchings" occur is unwarranted. Indeed, the current standard for analyzing hostile environment harassment is broad enough to encompass any allegations of "sexual assault" and/or touching of a sexual nature. A per se rule as contemplated by Petitioner is simply over inclusive and contrary to the existing doctrine which recognizes that any analysis must be flexible, contextual and fact specific.

It is clear that Petitioner's request for certiorari is largely founded on her dissatisfaction with how the lower court applied the law to the facts of her case. As Rule 10 of the Supreme Court Rules states, however, the proper role of a petition for certiorari is not for the purpose of correcting alleged error where no legal conflict exists among the circuits

and no important issue of federal law is otherwise at stake requiring action from this court to maintain decisional uniformity. Accordingly, the instant Petition for Writ of Certiorari should be denied in its entirety.

STATEMENT OF CASE

This is an employment discrimination case in which Petitioner alleged harassment by a coworker and retaliation by her employer in violation of Title VII of the Civil Rights Act of 1964, as amended, and in violation of the Florida Civil Rights Act. Petitioner also asserted a claim for constructive discharge. None of Petitioner's claims survived at the district court level. On appeal, the Eleventh Circuit Court of Appeals ("Eleventh Circuit") affirmed the United States District Court for the Southern District Florida's ("District Court") in its dismissal of Petitioner's claims on summary judgment.

A. District Court Proceedings

Respondent Adecco filed a Motion for Summary Judgment on May 1, 2003 and Motorola filed its Motion for Summary Judgment on May 5, 2003. The District Court heard oral argument on the Motions on August 22, 2003. After deliberating for seven months, the District Court granted the motions, dismissing Petitioner's claims for hostile environment harassment, retaliation, and constructive discharge in their entirety.

With respect to its decision to dismiss Petitioner's hostile environment claim, the District Court relied upon *Mendoza v. Borden Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999), setting

forth the following elements for a *prima facie* case[1] of hostile environment harassment:

> An employee must show:
>
> (1) that he or she belongs to a protected group;
>
> (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;
>
> (3) that the harassment must have been based on the sex of employee;
>
> (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and
>
> (5) a basis for holding the employer liable.

(Pet. for Cert. at p. 23a). Furthermore, the District Court noted that, in regard to the fourth prong of the *prima facie* case, the workplace was to be analyzed "as a whole," consistent with factors established by this Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). (Pet. for Cert. at pp. 24a-25a).

Using this standard and applying it to the facts in a light most favorable to Petitioner,[2] the District Court found that

1. Petitioner never asserted to the District Court that she had direct evidence of sexual harassment and, as such, the District Court applied analysis appropriate for a circumstantial case of harassment.

2. The facts that the District Court relied upon can be found at pages 12a-18a of the Petition for Writ of Certiorari.

Petitioner failed to establish that the incidents of which she complained met the second and fourth prongs of her *prima facie* case. (Pet. for Cert. at pp. 25a-28a). For example, many of the alleged harasser's comments, such as mentioning strip clubs to male and female coworkers alike and calling Petitioner's boyfriend a "dog," were not based on Petitioner's sex as required by the second prong set forth by *Mendoza*. Likewise, the District Court concluded that the instances of touching and other conduct by the alleged harassers were not so "frequent, severe, or pervasive to constitute actionable sexual harassment. . . ." (Pet. for Cert. at p. 26a). Accordingly, the District Court dismissed Petitioner's sexual harassment claim and granted summary judgment in Respondents' favor.

With respect to Petitioner's retaliation claim, Petitioner argued in response to Respondents' motions for summary judgment that she had direct evidence of retaliation. Specifically, Petitioner alleged that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to become a permanent Motorola employee and that Motorola would not hire her because she "complained too much." (R2-78-167-70, R2-79-268-70). Both Respondents argued that such evidence was hearsay and, therefore, not admissible, reliable or probative of Petitioner's retaliation claim. Ultimately, the District Court rejected Petitioner's direct evidence argument because it made a factual determination that Petitioner was never denied a permanent position:

> [T]here is no evidence that Bussell was denied a permanent position at Motorola. Evidence has been submitted which shows that Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she

> may have wanted or even expected to receive a permanent position at some time in the future is irrelevant.

Thus, Petitioner's retaliation claim was dismissed by the District Court along with her other claims. (Pet. for Cert. at p. 31a).

B. Appellate Court Proceedings

On appeal to the Eleventh Circuit, Petitioner asserted, by brief and in oral argument, that the District Court's decision dismissing all of her claims was erroneous. Specifically, Petitioner argued that the District Court erred when it found that the record did not support a finding that the alleged harassment was sufficiently severe or pervasive to be actionable. Petitioner further argued that the District Court erred in failing to find direct evidence of retaliation and in dismissing her constructive discharge claim.[3]

A three-judge panel of the Eleventh Circuit reviewed the case *de novo*. Based on its factual findings[4] and relying on *Gupta v. Florida Board of Regents* , 212 F.3d 571 (11th Cir. 2000), the three-judge panel decided, *per curiam*, that Petitioner had failed to establish a *prima facie* case of hostile environment harassment. Key to its reasoning, the panel opined that many of the comments made by the alleged harasser in the workplace were made to men and women alike, and, therefore, were not based on Petitioner's sex. The

3. Again, Petitioner never alleged she had direct evidence of sexual harassment or constructive discharge.

4. The facts that the Eleventh Circuit found probative appear at pp. 2a-7a of the Petition for Writ of Certiorari.

panel further noted that 10-16 alleged instances of touching by a co-worker over the period of several months were not severe or pervasive enough to constitute actionable harassment. The panel also noted that many of the cases cited by Petitioner involved harassment by a supervisor, not by a coworker, and that Petitioner failed to provide "an analogous holding that such alleged behavior is sufficiently severe or pervasive to constitute a hostile workplace sexual harassment claim." (Pet. for Cert. at p. 9a).

Petitioner also argued to the panel that she had direct evidence to support her retaliation claim. The panel, however, affirmed that there was no error by the District Court in rejecting Petitioner's retaliation claim, stating "there is no record evidence to support Bussell suffered from an adverse action by either of the defendants." (Petition for Cert. at p. 9a). The panel did not elaborate further, and simply concurred and affirmed the District Court's analysis and decision regarding the retaliation claim. Finally, the Eleventh Circuit rejected Petitioner's request for rehearing *en banc*.

This Petition for Writ of Certiorari ensued.

ARGUMENT

I. This Case Does Not Present An Appropriate Vehicle For Resolving The First Question Presented By Petitioner

Petitioner is correct when she asserts that there is a split among the federal circuit courts of appeal and lower federal courts as to what constitutes "direct evidence" in the context of an employment discrimination case. Petitioner is also accurate in stating that there is a split within the Eleventh Circuit as to what definition of direct evidence to apply in employment discrimination cases. This case, however, is not

properly postured to resolve this conflict because Petitioner's so-called "direct evidence" of retaliation is inadmissible hearsay. Furthermore, Petitioner never asserted below that she had direct evidence of constructive discharge and sexual harassment and, therefore, cannot propound such argument at this time. Thus, as explained more fully below, this case cannot be a proper vehicle for resolving this legal issue.

A. The Evidence Petitioner Seeks To Proffer As Direct Evidence Of Retaliation Is Inadmissible Hearsay.

Petitioner alleges that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to advance and that Respondent Motorola would not hire her permanently because of her complaints. (R2-78-167-70, R2-79-268-70). This constitutes the entire scope of Petitioner's "direct evidence" of retaliation. On it is face, this purported statement is double hearsay. *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455-57 (11th Cir. 1997) (comments by low-level supervisors repeating management's discriminatory comments are inadmissible hearsay), *accord Rojas v. Florida*, 285 F.3d 1339, 1343 n.3 (11th Cir. 2002). Furthermore, Karge, an Adecco employee, cannot make an admission on behalf of Respondent Motorola or vice versa. *See also Watson v. Adecco Employment Services, Inc.*, 252 F. Supp. 2d 1347, 1352-53 (M.D. Fla. 2003) (Adecco representative's purported statement to temporary workers that Adecco's client did not want them to return to work was inadmissible hearsay). Indeed, Petitioner admitted that no one at Motorola ever told her she would not become a permanent employee. (R2-78-167-70, R2-79-268-70). Therefore, the statement is inadmissible and was properly discounted by the lower courts in this case.

Even without regard to the inherent hearsay problems associated with the statement asserted above, Petitioner's retaliation claim would still fail on entirely independent grounds. First, there was no evidence in the record that any decision, one way or the other, was ever made regarding a permanent position for Petitioner with Motorola. (R2-79-267-69).[5] To the contrary, there was undisputed evidence in the record that Motorola was in the process of downsizing employees and was not hiring anyone. (R2-79-266; R2-82-62). The record further revealed that Petitioner was ineligible for permanent employment with Motorola as she had not yet been in her temporary assignment for a year. (R2-82-57-58).[6] Since Petitioner was *never* eligible for permanent employment at Motorola in the first instance, her retaliation claim that she was denied permanent employment simply does not bear scrutiny. *See, e.g., Williams v. Potter*, 316 F. Supp. 2d 1122, 1141 (D. Kan. 2004) (plaintiff who was ineligible for position because of low examination score could not prevail on retaliation claim alleging non-promotion). Consequently, the conflict regarding direct evidence in employment discrimination cases cannot be resolved based on the facts of this case.

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5. The record shows that Laila Pennington made no hiring decisions regarding Petitioner or anyone else. (R2-83-101).

6. When Petitioner left her assignment at Motorola at the end of January, 2001, she had been employed there for about eight months. She had only been there five months when she first complained of any harassment in October 2000.

B. Petitioner Never Asserted In The Courts Below That There Was Direct Evidence Of Constructive Discharge Or Sexual Harassment.

At page 15 of the Petition for Writ of Certiorari, Petitioner asserts that Adecco employee Kathy Brodeur stated that Petitioner "was forced out due to continuing harassment" and that Thomas Karge made a written notation that Petitioner "resigned due to continuing harassment" and that both statements constitute direct evidence of constructive discharge and harassment. In the first instance, Petitioner never argued to the courts below that she had direct evidence of these claims. Accordingly, she cannot now raise this argument for the first time in the context of a petition for writ of certiorari. *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (Supreme Court ordinarily does not consider issues "neither raised nor decided below"). Thus, these arguments are not properly before this Court and must be rejected. *Id.*

Not only are these arguments procedurally barred from this Court's consideration, but there was an independently sufficient ground for dismissing this claim as well. By her own admission, Petitioner states that at the time she resigned from her assignment at Motorola on January 31, 2001, the alleged harassment had been stopped for at least a month:

> Q. Okay. So [the alleged harasser] stopped touching you around late November, early December [2000]?
>
> A. Right.

(R2-79-304-306)

> Q. And let me just, so I'm clear, because I'm trying to get it clear in my head. Is it safe to say then after mid-December, [the alleged harasser] made no other comments to you about the size of your breasts or your hair growing because of sex, from mid-December through January 31st?
>
> * * *
>
> A. After December 26th, was the last time that I ever spoke to [the alleged harasser].

(R2-78- 165-66). Moreover, a week prior to her resignation on January 31, 2001, Motorola removed the alleged harasser from Petitioner's department, and placed him on a completely separate floor. (R3-153-7; R2-81-29; R2-78-119-20). Accordingly, Petitioner was not in fact subject to any hostile or unlawful conditions at the time she voluntarily left her Motorola assignment. (*Id.*)

Based on this undisputed record evidence, it was impossible for Petitioner to have sustained a constructive discharge claim with or without the alleged statements attributed Brodeur and Karge. Indeed, this Court has expressly held that to prevail on a claim of constructive discharge, the law requires that conditions be so unbearable that a reasonable person would feel compelled to resign. *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2351, 2354 (2004) (a plaintiff may only succeed on a constructive discharge claim if she demonstrates that "working conditions [were] so intolerable that a reasonable person in [her] position would have felt compelled to resign.") Petitioner's claim does not meet this standard. More specifically, since the harassment had stopped and the harasser had been removed

from Petitioner's department and work space, her work place was not so intolerable that it was reasonable for her to resign at that time.[7] *Id.*

Furthermore, while Petitioner may have ceased working at the Motorola facility, she was not in fact terminated or separated from her employment with Respondent Adecco. Indeed, upon Petitioner's departure from the Motorola facility, Adecco immediately found her another assignment with a different Adecco client. (R3-153-9; R2-78-170-71; R2-79-208-09; R2-82-119-20, 175, 227-28, 231-33). Thus, Petitioner remained in Adecco's employ and was not in fact "discharged," constructively or otherwise, from her employment with Adecco. (*Id.*)

In sum, since Petitioner, by her own admission, was not suffering from any form of harassment at the time of leaving her assignment and by virtue of the fact that she was still employed by Adecco, it was not possible for Petitioner to sustain a viable claim for constructive discharge. No finding of direct evidence by the lower courts would have changed this outcome. Thus, this case will not, as Petitioner erroneously asserts, resolve the current conflict among the federal courts regarding direct evidence to apply in the employment discrimination context. Therefore, the Petition for Writ of Certiorari should be denied as to this issue.

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7. Moreover, Petitioner's chief motivation for leaving Motorola was not that she was still experiencing harassment, but the fact that the alleged harasser had not been terminated as a result of her complaints. (R2-78-118-19). Her dissatisfaction with Motorola's business decisions simply cannot sustain a claim of constructive discharge.

II. There Is No Conflict Regarding The Standard Of Proof Necessary To Determine A Sexually Hostile Working Environment.

Petitioner's assertion that there is a split among the Circuits regarding the standard of analysis for a hostile working environment is illusory. In this case, relying on the Eleventh Circuit's *en banc* decision in *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), the District Court adopted the following hostile environment standard:

> An employee must show:
>
> (1) that he or she belongs to a protected group;
>
> (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;
>
> (3) that the harassment must have been based on the sex of employee;
>
> (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and
>
> (5) a basis for holding the employer liable.

(Pet. for Cert. at p. 23a). Additionally, the District Court noted that, in regard to the fourth prong of the *prima facie* case, the workplace was to be analyzed "as a whole," consistent with factors established more than a decade ago by this Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S.

17 (1993).[8] (Pet. for Cert. at pp. 24a-25a). On appeal, the Eleventh Circuit applied the same standard, citing *Gupta v. Florida Board of Regents* , 212 F.3d 571 (11th Cir. 2000), a

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8. This Court stated in *Harris*, 510 U.S. at 21-23, that:

> . . . When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," . . . , that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," . . . , Title VII is violated.
>
> This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in a employee," does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.
>
> * * *
>
> This is not, and by its nature cannot be, a mathematically precise test. . . . [W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

(Citations omitted).

case which adopted and reaffirmed the analysis set forth in *Mendoza* and *Harris*.

Unlike Petitioner's claims to the contrary notwithstanding, all circuits follow *Harris*, as they must and the formulas they have adopted in order to do so are not materially different or in tension with each other — much less in actual conflict. *See Pomales v. Celulares Telefonica, Inc.*, __ F.3d __ (1st Cir. 2006) (applying severe and pervasive standard and citing to *Mendoza*); *Alfano v. Costello*, 294 F.3d 365, 373-74 (2nd Cir. 2002) (Holding that "[a] hostile work environment claim requires a showing [1] that the harassment was 'sufficiently severe or pervasive to alter the terms or conditions of the victim's employment and create an abusive working environment,' and [2] that a specific basis exists for imputing the objectionable conduct to the employer," and citing to *Harris*); *Weston v. Pennsylvania*, 251 F.3d 420, 425-26 (3d Cir. 2001) (applying five-pronged test as well as analysis articulated in *Harris*); *Connor v. Schrader-Bridgeport International, Inc.*, 227 F.3d 179, 192 (4th Cir. 2000) ("A sexual harassment claim due to a hostile or abusive work environment requires proof of: (1) unwelcome conduct; (2) that is based on the plaintiff's sex; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer"); *Harvill v. Westward Communications, LLC*, 433 F.3d 428, 434 (5th Cir. 2005)

> To establish a hostile work environment claim, [plaintiff] must demonstrate that: (1) she is member of a protected group; (2) she was the victim of uninvited sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of

> [plaintiff's] employment; and (5) her employer knew or should have known of the harassment and failed to take prompt remedial action.

Burnett v. Tyco Corporation, 203 F.3d 980, 982-83 (6th Cir. 2000) (articulating and applying standard set forth by this Court in *Harris v. Forklift Systems*); *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498 (7th Cir. 2004) (Applying *Harris* analysis and citing to *Mendoza*); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 616 (8th Cir. 2000)

> A plaintiff asserting a hostile work environment claim must show (1) membership in a protected class, (2) unwelcome sexual harassment, (3) based upon gender (4) resulting in an effect on a term, condition, or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take proper remedial action. [citation omitted] . . . In addition, the plaintiff must show that the sexual harassment created an environment that was both objectively and subjectively abusive.

(*Citing Harris*, 510 U.S. at 21); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 871-72 n.4 (9th Cir. 2001) (using three-prong test, as well as severe and pervasive analysis set forth in *Harris*); *Riske v. King Soopers*, 366 F.3d 1085, 1091 (10th Cir. 2004 (articulating and applying standard set forth by this Court in *Harris v. Forklift Systems*).

In sum, there is in fact *no conflict* among the lower federal courts on this issue. *Id.* Nevertheless, in support of her request for certiorari, Petitioner contends that the lower courts "explained away the instances of sexual touchings

individually, rather than collectively," essentially accusing the Eleventh Circuit of failing to consider the "totality of the circumstances" in her case.[9] This argument proffered by Petitioner neither evinces a conflict among the circuits nor otherwise raises an important question of law requiring this Court's resolution, but instead merely raises an alleged point of analytical error. Such an error is not a proper subject for certiorari.

Indeed, Supreme Court Rule 10 states that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Instead, a "[a] petition for writ of certiorari will be granted only for compelling reasons" such as to resolve conflicting decisions among the federal appellate courts "on the same important matter." U.S. Sup. Ct. Rule 10(a). As shown by a review of the appellate cases above, Petitioner has wholly failed to show an existing conflict regarding hostile environment analysis. Nor has Petitioner shown that the courts in this case improperly stated the rule of law that applied to her case. As such, there are no grounds for granting the petition in regard to this second issue as asserted by Petitioner.

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9. Petitioner then cites to several cases apparently in support of her contention that the lower courts erred in finding no hostile environment existed. Most of the cases cited by Petitioner, however, are inapposite because they involve harassment by a supervisor, not harassment by a coworker which is the issue in this case. *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Circuit 2000) (harassment by supervisor); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62 (2d Cir. 2001) (same); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (same); *Moring v. Arkansas Dept. of Correction*, 243 F.3d 452 (8th Cir. 2001) (same); *Turnbull v. Topeka State Hospital*, 255 F.3d 1238 (10th Cir. 2001) (harassment of hospital staff by hospital patients).

III. This Case Does Not Present Any Basis For Adopting A Per Se Rule That "Sexual Assault" And/Or "Touchings" Constitutes Sexual Harassment.

Petitioner further urges the Court to adopt a per se rule that a sexual assault and/or "touchings" automatically constitute actionable sexual harassment. However, because there is no evidence in the record that Petitioner was sexually assaulted[10] she only has standing to advocate the overinclusive rule that any touching creates liability *per se*. Specifically, the record showed the following conduct:

- Robert Render, the alleged harasser, frequently complimented Petitioner. (R3-153-3; R2-73-49-52, 57, 61-62).

- Render talked loudly, used vulgar language, made demeaning comments about women's bodies in general, and bragged to various employees about his social life, which included cheating on his wife and

10. Section 784.011 of Florida's criminal statutes defines "assault" as "an intentional, unlawful threat by word or act **to do violence** to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such **violence is imminent**." (emphasis added). FLA. STAT. § 784.011 (2005). Moreover, Florida criminal law defines "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." FLA. STAT. § 794.011(1)(h) (2005). By her own account of the conduct she was subject to, Petitioner never asserted that the alleged harasser threatened her with violence that she believed violence to be imminent. Nor were Petitioner's genitals penetrated by or united with the genitals of the alleged harasser.

visiting strip clubs. (R3-153-3; R2-78-49-51). Render's comments were addressed to technicians who sat near him or anyone else in the room, male or female, who would listen. (R3-153-3; R2-78-50-53).

- In October 2000, Render, who was behind Petitioner when she was bending over, pulled Petitioner's shirt up and the back waist of her pants down to expose a large tattoo across the lower half of her back. Petitioner was uncertain what Render said when he did this, but it was something along the lines of "nice tattoo" or "nice ink."[11] (R3-153-3-4; R2-78-63-64, 66-67, 78, 109).

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11. During cross-examination by counsel for Respondent Adecco, Petitioner's testimony on this issue was as follows:

> Q. Let's return to Render when he touched you. What did he do to you?
>
> A. I was bending over to pick up radios. I don't recall exactly what I was wearing, but it was probably something kind of baggy because I'm 30 pounds heavier than I am now.
>
> I was bending over picking up the radios when I felt someone pulling the back of my pants down and the top of my shirt up, and like pulling –I mean, like, not just pulling a little bit, like grabbing down and yanking my shirt up and saying something along the lines of nice tattoo, and I freaked out. I did not know what had just happened.

(R2-78-77-78).

(Cont'd)

(Cont'd)

Q. And when Bob pulls your slacks, whatever he pulled them, what comment did he make to you or anybody else about the tattoo?

[Petitioner's counsel]: Object to form.

Q. Did he say anything to you?

A. Yes, remember he said—okay.

When he pulled my pants down, he said nice tattoo or nice ink, one of the two. I believe it was tattoo.

Q. Nothing else?

A. No.

Q. Did he make any comment about your body, your buttocks or—

A. He didn't need to, he was touching it.

Q. I understand. But did he make any comment about your buttocks, about your body at the time he looked at the tattoo?

A. No.

Q. Didn't say anything about sex?

A. I told you, all he said was nice tattoo.

(R2-78-109).

Q. And when he touched you, he touched your clothes as opposed to—

(Cont'd)

- Render began a habit of "rubbing his crotch up against [Petitioner's] back as he walked by, as if there was not enough room for him to get through." (R3-153-4-5; R2-78-80-81). Petitioner further

(Cont'd)

> A. Well, he had to touch my body to get to my clothes. My clothes weren't just like loose off me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my lower back and my butt; and to rip my shirt, he's touching my back.
>
> Q. But he didn't do any—well, let me ask you this: Did he do anything to either grope or attempt to massage your butt in any way?
>
> A. No.
>
> Q. At that time?
>
> A. No, all he did was pull down my pants and pull up my shirt.
>
> Q. Didn't make any comment about sex or desire to have sex with you at that time?
>
> [Petitioner's counsel]: Object to form.
>
> A. No.

(R2-78-110)

Note that at pages 5-7 of the Petition for Writ of Certiorari, Petitioner conveniently omits the non-sexual comments Render made and the lack of any groping that occurred during this incident. Conceivably, had Petitioner's tattoo been in a place less titillating than her lower back (i.e., on her arm or hand), this touching would not have suggested or implied any form of sexually inappropriate conduct.

testified ". . . I would be sitting down and he would walk by and I could feel his pants and the contents rubbing up against my shoulder. I would turn around and he would wink at me funny or smile at me funny, and I would get grossed out." (R3-153-5, n.3; R2-79-305-06). This "rubbing" occurred approximately 10-15 times during November-December [2000] until finally, Petitioner got "fed up" and jammed the back of her chair into Render. After that, Render did not touch Petitioner in any manner again. (R3-153-5; R2-78-80-81, 119; R2-79-304-06).

- During November and December 2000, Render complimented Petitioner's body multiple times a day, commenting on her thick lips or telling her how nice her blouse looked. A couple of times he commented on how fast her hair was growing and stated that she must be sexually active. Twice he asked her why she would choose to be with a boy (referring to her same aged boyfriend with whom she lived) when she could have a man just like him. (R3-153-5; R2-78-39-40, 81, 113-14, 164; R2-79-304-06).

- Sometime after October 2000 but before December 2000, Jason Wells came up from behind her, grabbed her *underneath* her chest, and started tickling her. According to Petitioner, Wells said, "I bet your daddy touched you like that when you were a little girl and you liked it." (R3-153-5-6; R2-79-284-85). Wells never touched Petitioner or said anything offensive to her again. (R3-153-6; R2-82-144).

- No other conduct occurred after December 26, 2000.

While the alleged harassers' conduct was boorish and inappropriate, it was not violent or criminal in nature.

In addition to omitting facts from context, Petitioner's rendition of the facts contains actual misstatements and/or exaggerations of the record evidence. For example, at pages i and 9, of the Petition for Writ of Certiorari, Petitioner states Jason Wells touched her breasts with his hands and that a penis was rubbed against her. Such assertions are unsupported by the record.[12] (R3-153-5-6; R2-79-284-85, 305-06, 311).

Moreover, the current state of analysis concerning hostile environment as articulated by *Harris v. Forklift Systems, Inc.* and its progeny, including *Mendoza* and *Gupta*, is broad enough to encompass cases where a true sexual assault has

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12. Similarly, Petitioner continues to cite and rely on inadmissible hearsay as "evidence" of harassment. Specifically, at page 9, Petitioner states Render would stand behind her and look down her shirt at her breasts; however, this statement is inadmissible hearsay as Petitioner says she was told this by her coworker:

> A. . . . Like I said, I didn't have any problems with [the alleged harasser] before. I would help him because he didn't have an air hose to blow out his lenses before he would send them off to get assembled and **then I was told that he was looking down my shirt** and I was like—
>
> Q. Told by whom?
>
> A. Jarvis said don't do that for him anymore, he's looking down your shirt and I'm like, yeah, right. But nothing had happened at that point.

(R2-79-305).

occurred, while evaluating "touchings" in context. In *Harris*, this Court has instructed as follows:

> This is not, and by its nature cannot be, a mathematically precise test. . . . [W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris, 510 U.S. at 22-23. Under this broad standard of analysis, courts have been able to make findings of actionable hostile environment in cases where the facts involve egregious sexual misconduct, including sexual assault and rape. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 77 (1998) (threat of rape and physical assault by co-workers may create actionable hostile environment); *Little v. Windermere Relocation, Inc.* 301 F.3d 958, 967-68 (9th Cir. 2002) (Using *Harris* analysis to conclude that the rape of the plaintiff by a business colleague could support a finding of hostile environment); *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2nd Cir. 2004) (plaintiff's sexual assault by a coworker coupled with other conduct warranted finding of hostile environment). Thus, there is no need for this Court to adopt an overtly broad per se rule that sexual assault (not even present here) and/or that any arguably sexual touching constitutes a hostile work environment. Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

CONCLUSION

As demonstrated above, this case is not properly postured to resolve the existing conflict among the federal courts as to what standard of direct evidence to apply in the context of employment discrimination cases. Furthermore, Petitioner has otherwise failed to present any other conflict or compelling legal question warranting this Court's consideration. Accordingly, the Petition for Writ of Certiorari should be denied.

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In The
Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC. AND
ADECCO EMPLOYMENT SERVICES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF MOTOROLA, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should accept petitioner's invitation to define "direct evidence" in the context of employment discrimination even though this issue was not addressed by the courts below and, in any event, cannot alter the outcome of this case?

2. Whether this Court should exercise certiorari jurisdiction to determine whether the court of appeals misapplied a well-settled legal standard as to which there is no split in the circuits, particularly where the court of appeals determined that petitioner "distort[ed] and exaggerate[d] the evidence and testimony on the record"?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Motorola, Inc. ("Motorola") states that it is a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

All parties to the appeal in the Eleventh Circuit are listed in the caption of the petition.

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BRIEF OF MOTOROLA IN OPPOSITION

The petition for writ of certiorari should be denied because this case is not a good vehicle for addressing the questions presented. The first issue – the purported split among the circuits on the meaning of "direct evidence" – was not addressed by either court below and, in any event, cannot affect the outcome of this case because the purported direct evidence is not relevant. The second asks whether the Eleventh Circuit misapplied established law to the particular facts of this case and thus does not warrant the exercise of this Court's certiorari jurisdiction under Supreme Court Rule 10. Further, there is no split in the circuits on this issue to justify this Court's review.

COUNTERSTATEMENT OF THE CASE

The court of appeals, like the district court, noted that the position of petitioner Meghan Bussell ("Bussell") "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record." Pet. App. at 7a; *see id.* at 26a n.7. The same is true here. Motorola, therefore, submits the following counterstatement of the case.

The relevant events transpired during a three month period when Bussell worked for Respondent Adecco Employment Services, Inc. ("Adecco") as a temporary employee assigned to assemble police radios at Motorola's "Inpact Center." *Id.* at 13a. Bussell began working at the Inpact Center in August 2000, but she testified that she did not believe that she was sexually harassed until October 2000. *Id.* at 2a-3a. Bussell also concedes that she did not experience any further incidents of sexual harassment once she complained to Motorola's Human Resources Department

("HR") on or about December 27, 2000. *Id.* at 17a. After making her complaints known to Motorola's HR department, Bussell told Motorola that she was comfortable with returning to the Inpact Center. *Id.* at 15a-16a. Bussell resigned from her position at the Motorola Inpact Center on January 31, 2001, and immediately found other employment. *Id.* at 18a.

Bussell alleges sexual harassment based on: (1) comments made by a co-worker, Robert Render ("Render"), in October, November, and December 2000; (2) an incident in October 2000, when Render pulled on Bussell's clothing to expose a tattoo; (3) approximately 10 to 15 times in November or December 2000 when Render walked behind Bussell's desk and allegedly "rub[bed] his crotch against [her] back as he walked by, as if there was not enough room for him to get through;" and (4) a single unwelcome experience with another co-worker, Jason Wells ("Wells"), who grabbed and tickled Bussell one day in late October or early November 2000. *Id.* at 13a-14a.

Neither Render nor Wells supervised Bussell. *Id.* at 9a, 12a, 27a. They were only co-workers. *Id.* Bussell's immediate supervisors were Adecco's Tom Karge ("Karge") and Motorola's Laila Pennington ("Pennington"). *Id.* at 2a. When Bussell reported the tattoo incident to Pennington and Karge in October 2000, they promptly held a meeting for the entire department in which they reiterated to the employees (approximately 30 to 40) that neither touching nor talking "dirty" was permitted in the workplace. *Id.* at 14a. Pennington emphasized that Motorola and Adecco had "zero tolerance" for such behavior and that the employees were required to follow the companies' sexual harassment policies. *Id.* Although Bussell complained of the "rubbing" to her Adecco supervisor, she never told her Motorola supervisor about this alleged behavior. *Id.*

Bussell has admitted that she did not report the alleged sexual harassment to Motorola's HR department until late December, 2000, and then only after she herself engaged in offensive conduct. *Id.* at 5a. On December 26, 2000, Bussell began swearing at Render after he called her a "stupid girl." *Id.* Karge then took Bussell to Motorola's HR department, where she was written up for cursing. *Id.* It was at this time that Bussell first complained to Motorola's HR of sexual harassment. *Id.* Marcy Covington, Motorola's HR Administrator, immediately commenced an investigation of Bussell's sexual harassment claims. *Id.*

No witnesses corroborated Bussell's claims of inappropriate touching. *Id.* at 16a. Motorola did find that Render used foul language. *Id.* Motorola, however, concluded that – while the language was a form of harassment – it was not *sexual* harassment. *Id.* Most of Render's offensive comments were made to technicians who sat near him and were not directed specifically at Bussell. *Id.* at 2a, 8a, 13a. As punishment for his boorish conduct, Motorola gave Render a written warning, transferred him to a different department, and placed him on probation for a one-year period. *Id.* at 5a. Motorola also held mandatory sexual harassment training for all employees in the Inpact Center. *Id.* Bussell felt that she should not have had to attend the training session and that her required attendance was a form of retaliation. *Id.* at 6a.

Bussell claims that she had wanted to become a full-time employee at Motorola, but that an Adecco employee, Karge, told her that she could not because Motorola was tired of her complaining. *Id.* She admits, however, that no member of Motorola management had ever told her that her "complaining" had caused her not to become permanent. *Id.* at 6a-7a. She also admits that only a "couple" of

Adecco employees were hired as permanent Motorola employees. *Id.* The undisputed evidence showed that temporary employees were not eligible to become full-time employees until they had worked at Motorola for at least 12 months. *Id.* at 31. Bussell had worked there less than nine months when she resigned.

After resigning, Bussell sued Adecco and Motorola for sexual harassment, retaliation, and constructive discharge. The district court granted Adecco and Motorola summary judgment on all counts. In rejecting the sexual harassment claim, the district court followed precedents from this Court. *Id.* at 24a. "Although Title VII's prohibition of discrimination clearly includes sexual harassment, binding case law is quick to point out that Title VII is not a federal 'civility code.' *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) ('We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.'); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). . . ." Pet. App. at 21a. The district court concluded that Bussell's workplace sexual harassment claims failed as a matter of law because, "[a]fter sifting out Render's offensive comments that were not directed at Bussell or comments that were not of a sexual nature," all that is left is co-worker conduct that is not so severe or pervasive as to render the employer liable under the standards prescribed by this Court. *Id.* at 27a-28a.

With respect to Bussell's retaliation claim, the district court found that the actions she cited as retaliation did not rise to the level of adverse employment actions as a matter of law and that there was no evidence that Bussell had suffered from an adverse employment decision by either

Motorola or Adecco. *Id.* at 30a. "It is undisputed that Bussell never spoke with anyone at Motorola before deciding to resign. . . . Additionally, . . . Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she may have wanted or even expected to receive a permanent position at some time in the future is irrelevant." *Id.* at 30a-31a. The district court further held that Bussell's claim of constructive discharge had no merit because, by Bussell's own admission, the alleged sexual harassment had stopped before she resigned from Motorola. *Id.* at 31a.

The Eleventh Circuit affirmed in an unpublished *per curiam* opinion that is not considered binding precedent. *Id.* at 1a; *see* Eleventh Cir. Rule 36-2. On its face, the opinion of the court of appeals is fact-specific. It does not attempt to establish a new standard for judging sexual harassment claims or to distinguish between direct and circumstantial evidence. After conducting an extensive *de novo* review of the record and case law, the court of appeals could find no precedent to support the conclusion that the co-worker behavior alleged by Bussell was sufficiently severe or pervasive to constitute hostile workplace sexual harassment. Pet. App. at 9a. The court of appeals also found that the timing of Bussell's voluntary resignation – a fact issue – negated the retaliation and constructive discharge claims. *Id.* at 10a. The Eleventh Circuit, therefore, affirmed for the reasons set forth in the district court's order, which correctly articulated the controlling legal standards. *Id.* at 9a.

REASONS FOR DENYING THE PETITION

I. This Case Is Not A Good Vehicle For Addressing The First Question Presented

Petitioner's first question asks this Court to resolve what petitioner claims is a split of authority, or at least confusion, within the Eleventh Circuit and among the circuits regarding what constitutes "direct evidence" in an employment discrimination case. Petitioner's question does not warrant review, however, because the issue was not addressed below. *E.g., United States v. Williams*, 504 U.S. 36, 41 (1992); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987).

In the district court, petitioner argued that she had "direct evidence" of retaliation because, according to her, Karge, her Adecco supervisor, had told her that her Motorola supervisor had told him that petitioner would not get a permanent Motorola position because she "complained too much." Motorola's principal response was that the alleged statement was inadmissible as double hearsay. The district court never determined whether the statement was either hearsay or direct evidence. Instead, the district court found that there was no adverse employment action as necessary to support a retaliation claim because Bussell voluntarily resigned before being eligible for the permanent position. Pet. App. at 31a. Likewise, the court of appeals never discussed the direct evidence issue. It simply affirmed the summary judgment "for the reasons set forth in the district court's order." *Id.* at 9a. In any event, Bussell's voluntary resignation when she was not even eligible for permanent employment negates her retaliation claim and renders the inadmissible purported direct evidence irrelevant. *Id.* at 9a-10a, 30a-31a.

In her petition, Bussell also argues that there is direct evidence of constructive discharge and sexual harassment in the form of findings by Adecco and Motorola that Bussell was subjected to sexual harassment. *Id.* at 15. However, this purported direct evidence does not exist. Neither Adecco nor Motorola found that Bussell was subjected to sexual harassment. *Id.* at 16a. As noted by the district court and the court of appeals after its *de novo* review – although Motorola found that Render used inappropriate language – it rejected Bussell's contention that Render sexually harassed Bussell. *Id.* Moreover, there is no basis to grant Bussell's petition on this purported direct evidence issue because the court below never distinguished between direct and circumstantial evidence of sexual harassment.

II. There Is No Split In The Circuits To Justify This Court's Review of the Second Question Presented

The Court should reject Bussell's attempt to manufacture a split in the circuits on the burden of proof necessary to establish a claim for sexual harassment. Bussell's real problem is that the panel found the facts did not support a legal claim under well-established standards, not that it articulated a new legal test that creates a split in the circuits.

The court of appeals specifically applied the totality of the circumstances test articulated by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). It affirmed only after conducting an extensive review of the totality of the circumstances and concluding that the evidence of co-worker harassment was insufficient

because it was not so severe or pervasive to alter the conditions of her employment. Pet. App. at 8a. The panel cited *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582-83 (11th Cir. 2000), which, in turn, sets out the *Faragher* "totality of the circumstances" test. Pet. App. at 8a. The panel also endorsed the opinion of the district court, which correctly invoked the *Faragher* standard. Pet. App. at 9a, 21a.

In *Faragher*, this Court explained that, in determining whether an environment is sufficiently hostile or abusive to constitute actionable sexual harassment, the courts must look "'at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. City of Boca Raton*, 524 U.S. at 787-88, *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *accord Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). That is precisely what the district court and court of appeals did in this case. Pet. App. at 24a-25a.

Bussell also challenges the panel's finding that Render's crass descriptions of strip bars and the like, which were directed to his co-workers at large rather than to Bussell, did not constitute sexual harassment. *See* Pet. App. 8a. When read in context, however, this statement is merely another way of heeding this Court's frequent admonitions not to make Title VII a "general civility code." *Faragher*, 524 U.S. at 788, *citing Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). The court of appeals did not announce an absolute bar to a sexual harassment claim any time a male witness to sexual harassment finds it offensive, as Bussell claims. Rather,

the court of appeals found that there must be sexual harassment in the first place before liability can attach. Pet. App. at 8a-9a. This finding, which is consistent with the teaching of this Court, does not support Bussell's petition.

None of the cases cited by Bussell conflicts with the rule of law cited by the courts below. Bussell has not demonstrated a split among the circuits on the standard for a sexual harassment claim. All of the cases cited by Bussell turned on the application of the same *Faragher* factors that governed the opinions below. Moreover, this Court should not adopt the new rule urged by Bussell – that an employer is *per se* liable for work environment sexual harassment based on unreported touchings by a co-worker with no supervisory authority – which is without precedent. *See* Pet. App. at 9a.

In sum, the Court should deny review of the second question because it really asks this Court to determine whether the unpublished, *per curiam*, fact-intensive opinion of the court of appeals erred in the application of a correctly articulated rule of law. As explained by Supreme Court Rule 10, such is not an appropriate reason for exercising this Court's certiorari jurisdiction.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., a Delaware corporation and ADECCO EMPLOYMENT SERVICES, INC., a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO DEFENDANTS' COUNTERSTATEMENTS OF THE CASE

Defendant Motorola argues that because the Court of Appeals noted that Bussell's position "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record" (*Motorola's Response* at 1), this Court should not grant *certiorari* review. No court below ever identified any of the alleged distortions or misrepresentations. In fact, Bussell's Response to Defendants' Motions for Summary Judgment and her Briefs in the Court of Appeals set forth block quoted evidence, much like her statement of the case in her Petition for Certiorari. Those long quotes of record evidence taken from depositions have not been distorted or misrepresented in any way. Rather, it is the Defendants' Statement of the Cases in their Response Briefs that contain distortions and misrepresentations, and they also do not contain a summary of the facts of the case in the light most favorable to Bussell, which is the required standard under Rule 56. Every factual statement made by Bussell to the district court and to the Court of Appeals, to the extent that it was not a block quote, was supported by a correct citation to record evidence.

An example of a misrepresentation of the record by Defendant Motorola is their statement that "[n]o witnesses corroborated Bussell's claims of inappropriate touching." (*Motorola's Response* at 3) (citing Bussell's Appendix at 16a). Contrary to Motorola's representation, Bussell's coworkers (Jarvis Aguilera, Andrew Ducker, Chip Mills) corroborated Bussell's claims. (R2-97-159-60, 166-67; R2-112-255-56; R2-95-48-49; R2-95-74-75, 116-17). Part of the deposition testimony relied on for this proposition shows that Marcy Covington (Motorola's HR manager) specifically had in her notes of Bussell's complaints that she spoke with these people, and they corroborated Bussell's claims.

An example of a distortion of the record by Motorola is their assertion that Bussell only reported the sexual

harassment to Motorola's HR department after she engaged in offensive conduct. (*Motorola's Response* at 3). That is a distortion of the record and is misleading, because, under Motorola's sexual harassment policy, the person to whom Bussell was supposed to report sexual harassment was Laila Pennington, her Motorola supervisor. (R2-116-55). Bussell properly followed this policy by complaining to Pennington. (R2-116-55, 58-59). Although Motorola policy required *Pennington* to bring Bussell's complaint to HR (R2-114-40, 45, 46-47, 52), Pennington did not do so, because she thought she could "just find out what's going on and, you know, take it on my own. . . ." (R2-116-36).

Adecco required (and trained) Tom Karge to immediately investigate any complaint of sexual harassment. (R2-99-22-23). Karge was then required to report the allegation to Motorola's HR and to Adecco's HR in New York. (R2-99-50, 13). The Motorola HR person and the Adecco supervisor were then supposed to coordinate an investigation, because the Motorola HR person would not be allowed to talk to an Adecco employee (and vice-versa) without an Adecco supervisor present. (R2-99-68); (R2-97-20-21, 36, 82-84). Despite this requirement, Motorola and Adecco did not conduct any such joint collaborative investigation into Bussell's claims. (R2-97-194-95, 198). This is so, even though Bussell complained to both Karge (the Adecco supervisor) and Pennington (the Motorola supervisor) repeatedly.

Bussell continually complained to Pennington about the sexual harassment, but every time that Bussell complained, Pennington would call her a liar, a baby, and a problem-causer. (R2-109-189). Pennington would constantly put Bussell down. (R2-109-189). Pennington would yell and scream at Bussell for no legitimate reason, and attempt to get her into trouble with her Adecco supervisor by contriving poor performance allegations, although Bussell did nothing wrong, and was a good employee. (R2-110-197).

Although Bussell testified that she complained to Pennington constantly, Pennington testified that Bussell only complained to her on two occasions. (R2-116-58-59). Pennington has no notes or other evidence that would indicate when, where, or how many times Bussell complained to her. (R2-116-93). Pennington performed absolutely no investigation of Bussell's complaints, and she denied that she knew that there was any harassment occurring. (R2-116-48). Concerning Bussell's "first" complaint to Pennington, Pennington testified as follows: Q: "Did you investigate that [Bussell's complaints of sexual harassment]? A: No." (R2-116-48-49). Pennington did not investigate Bussell's "second" complaint either. (R2-116-60).

In fact, Pennington never even asked Render (one of the main harassers) whether Bussell's allegations of sexual harassment were true. (R2-116-50-51, 70). Pennington testified that she had enough training and knowledge to determine whether an employee is being sexually harassed, but she stated that she did not know whether Bussell was sexually harassed, because she did not do an investigation. (R2-116-133-35). These facts require the conclusion that Bussell complained properly under the Respondents' policies, and the Respondents failed to adequately investigate the complaints.

REASONS FOR GRANTING THE WRIT

I. CONCERNING THE QUESTION PRESENTED PERTAINING TO DIRECT EVIDENCE; (1) BUSSELL PRESENTED HER DIRECT EVIDENCE ARGUMENTS BELOW; (2) THE DIRECT EVIDENCE IS NOT INADMISSIBLE HEARSAY; AND (3) BUSSELL DID SUFFER ADVERSE EMPLOYMENT ACTION.

Initially, the Court should note that Respondent Adecco has admitted that there is a split in the circuits concerning the standard for direct evidence in an employment case, and the effect of such a finding on the case. (*Adecco Brief* at 6).

There is direct evidence of sexual harassment, because both Respondents found that Bussell was sexually harassed; such arguments were clearly raised below, as set forth below. Covington conceded that the offensive comments that Bussell's co-workers told her Render was uttering created a hostile work environment. (*See Petition for Certiorari* at 11-12).

Motorola's Statement to the EEOC stated that "Render was given an incident warning and put on probation for a one year period with the understanding that any further violations of the sexual harassment policy would result in his immediate termination." (R2-116-180-81). Martha Jaramillo, a high-level management official of Motorola, who was the ultimate decision-maker concerning the discipline and resolution arising out of Bussell's complaints, testified that Render "created a hostile work environment discussing strip clubs and making comments and unwanted words." (R2-97-100).

In Karge's (Adecco's on-site supervisor) findings concerning the sexual harassment allegations, Karge found, on January 29, 2001, as follows: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept which was causing her to get ill. . . ." (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them. (R2-112-173-74).

Direct evidence of retaliation exists, because Karge told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . ." (R2-110-268, 168).

There is direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers) testified that Bussell did not quit. (R2-99-92). Brodeur believes

that Bussell was essentially forced out of her employment "due to continuing harassment." (R2-99-168).

These arguments (the foregoing five paragraphs) were clearly raised below. See *Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35).

The comments are not inadmissible hearsay or double hearsay, but rather clearly admissions by a party-opponent, because they come from management personnel discussing employment decisions in the course and scope of their employment. Fed. R. Evid. 801(d)(2).

A former Fifth Circuit case is directly on point here, and requires the conclusion that the evidence in question is not hearsay. In *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir. 1977), the plaintiff-employee's supervisor (Jackson) made a comment over the telephone that was overheard by another employee. The employee's testimony (about what Jackson said) was held to be non-hearsay (under Rule 801(d)(2)(C)), as follows:

> Trial evidence established that Jackson [the main protagonist] was Kingsley's [the plaintiff] superior within the Baker/Beech-Nut Sales Division, that Jackson was responsible for appraising Kingsley's work, and that Jackson reported these evaluations to his superiors who in turn acted upon them. It is clear, therefore, that Jackson had the authority from Baker/Beech-Nut to make the statements quoted from his telephone conversation. . . . Accordingly, Jackson's statements are not excludable hearsay and are admissible.

Kingsley v. Baker/Beech-Nut Corp., 546 F.2d 1136, 1141 (5th Cir. 1977).

Adecco seizes on the fact that Bussell does not claim that she heard the alleged retaliatory statement from Pennington directly. It does not matter, because both

statements are non-hearsay, as they constitute admissions by a party-opponent. As stated, management officials acting in their representative capacities made these statements. Karge, Bussell's supervisor, was instructing Bussell as to what employment decision Pennington decided to make concerning Bussell. The entire context of the conversation was Karge informing Bussell how Pennington was going to retaliate against her. Karge, as Bussell's supervisor, was the appropriate person to tell Bussell of Pennington's decision.

In this case, both prongs of hearsay clearly fall into Rule 801(d)(2)(A)'s scope, because both Karge and Pennington were managing agents. Pennington specifically admitted that she was a manager, and Karge is unquestionably a managing agent, because he supervised 400-500 people at the Motorola job site for Adecco. Accordingly, Bussell's testimony that Karge told her that Pennington told him that Bussell was not going to be made a permanent employee because she complained too much about harassment and retaliation is not hearsay, because neither prong of the two prongs is hearsay, because both prongs consist of statements uttered by managers.

Likewise, *Zaben* does not require the conclusion that Bussell's statement is hearsay. In *Zaben*, two low-level employees heard rumors that unidentified management officials had said that they wanted to get rid of the older workers. *Zaben*, 129 F.3d at 1455. The low-level employees had nothing to do with the employment decision which affected Mr. Zaben. The court found that Zaben's testimony about what the two low-level employees told him "present[ed] a double hearsay problem because the declarants seemed to be repeating what other unidentified, declarants had told them." *Id.* at 1455. Mr. Zaben could not establish a hearsay exception, because he could not identify the declarants. Moreover, the court noted that Mr. Zaben ran into another hearsay problem, that being that the two low-level supervisors had no involvement or

authority over the employment decisions in questions, and therefore were really only repeating rumors.

The *Zaben* case specifically approved of the exact situation in this case as not constituting hearsay, as the court cited approvingly to *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990), noting that "statements by the plaintiff's supervisor about 'the attitude, intentions and/or policy of the higher-ups' in management were properly admitted into evidence." *Id.* at 1456 (citing *Hybert*). The situation in the *Hybert* case that *Zaben* approved, is precisely the situation here, given the relationships between Karge, Bussell's supervisor, and Pennington as Bussell's Motorola supervisor.

Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, as follows:

> A: [After the pulling-down-the-pants incident, which Bussell complained about as being sex harassment]. Yes. I told Tom what had happened. Tom came back to me. All of a sudden, Tom's telling me that both Russ and I are no longer eligible to be made Motorolins [a permanent Motorola employee] because Laila has made it impossible for us.

(R2-109-168). After six to eight months at work, the temporary employees were being made permanent employees. (R2-109-169). Bussell testified as follows:

> Q: Did anyone tell you when you went to Motorola that this was a six-month assignment?
>
> A: Nope. They told us it was temporary, but they said it could be six months to a year to longer, but that we had the opportunity after six months to be transferred to be a Motorolin [a permanent Motorola employee].

(R2-109-183). Bussell was told that she was not going to move up to such a position. (R2-109-265). Again, Defendants' argument that it is undisputed that Bussell could

never have been made a permanent Motorola employee is a disputed issue of material fact.

Bussell clearly suffered adverse employment action, and Motorola admitted that Bussell had her pay docked. (*Motorola's Brief to Eleventh Circuit* at 48) (citing R2-78-159-161). Further, concerning the issue of whether Bussell suffered adverse employment action, the recent case of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) (decided after the *certiorari* petition in this case was filed), held that reassignment of job duties constitutes materially adverse employment action, as does suspension. At a minimum, the *White* case requires that the Court remand to determine in light of *White* whether the adverse employment actions that Bussell endured are actionable. This is because, as argued below (Statement of Facts in Opposition to Summary Judgment at p. 17, ¶ 138) and (Brief on Merits 33-34), Bussell was given 3-5 times the work of others after she complained, was sent home (suspended) without pay (which caused her to suffer economic loss), and she was not made a permanent Motorola employee, which caused her to suffer economic loss. Even under Eleventh Circuit precedent, such economic loss is clearly actionable for a retaliation claim. *Gillis v. Georgia Dep't of Corrections*, 400 F.3d 883 (11th Cir. 2005).

II. THERE IS A SPLIT IN THE CIRCUITS CONCERNING THE APPLICABLE STANDARDS FOR PROVING SEXUAL HARASSMENT, AND BUSSELL DID ARGUE BELOW THAT THE DEFENDANTS' ADMISSIONS (BY THEIR MANAGEMENT OFFICIALS) THAT BUSSELL WAS SEXUALLY HARASSED CONSTITUTE DIRECT EVIDENCE OF SEXUAL HARASSMENT.

Bussell clearly argued below that she had direct evidence of sexual harassment, retaliation, and constructive discharge. See Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment

(pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and Memorandum of Law in Opposition to Summary Judgment (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35). See also (*Petition for En Banc Review* at 15).

Adecco argues that the harassment stopped by December 2000 (*Response* at 9-10), but there is disputed evidence concerning that issue, because Karge admitted that Bussell was still complaining about sexual harassment after the December 26, 2000, meeting she had with Covington, as follows:

> Q: So, was Megan [sic] complaining about harassment after she met with Marcy [Covington] that day?
>
> A: When we met with Marcy was after the meeting and – in about a – two or three days later Meghan came back saying that it's still continuing.

(R2-112-133-34).

Both Respondents deny that there is a split in the circuits concerning the standard for sexual harassment, but they are mistaken, because as pointed out in the Certiorari Petition, numerous courts have held that sexual touchings of one's private parts *per se* constitute sexual harassment, while the courts below did not agree with those holdings. The Respondents merely refer to general circuit restatements of the prima facie for proving sexual harassment for their contention that there is agreement among the circuits. However, several courts have applied a "touchings" rule, and that rule is clearly in dispute in the circuits. (*See Certiorari Petition* at 30).

Further, concerning Motorola's definition of assault as set forth in *Florida Statutes* § 784.011, it is clear that Bussell was assaulted, because she testified that her clothes were ripped off of her (pants ripped down and shirt ripped up). (R2-109-109-10) (Bussell's use of the word rip in her deposition clearly connotes violence).

Finally, Respondents do not respond to Bussell's argument that the Panel decision improperly discounted (and thus is in conflict with other circuits) the sexually harassing conduct by finding that where "the conduct complained of is equally offensive to male and female workers . . . [t]he sexual harassment would not be based on sex because men and women are accorded like treatment". *Panel Decision* at 9 (citing *Cross v. State of Ala.*, 49 F.3d 1490, 1504 (11th Cir. 1995)). The Court should grant *certiorari* on that issue, because it precludes a finding of sexual harassment, as long as the employer comes up with a witness of the opposite sex who can say that he or she was also offended by the conduct. It creates an entirely new affirmative defense to sexual harassment that conflicts with *Faragher*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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